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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

WILKINSON AND MONAGHAN, A PROFESSIONAL CORPORATION AND BILL V. WILKINSON,

Petitioners,

v.

HILLCREST HEALTHCARE CORPORATION, HILLCREST MEDICAL CENTER FOUNDATION, HILLCREST REAL ESTATE, INC., HILLCREST SERVICE COMPANY, JERRY PULS, M.D., DOUGLAS HUBNER, M.D., JERRY L. PULS, M.D., INC., AND SOUTH UTICA PATHOLOGY LABORATORIES, INC.,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Oklahoma, Division Four

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an attorney, against whom sanctions have been imposed in a civil case, has been denied the constitutional requirement of a neutral adjudicator when the judge imposing the sanctions had previously determined essential issues of law directly related to the sanctions hearing.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Bill V. Wilkinson and Wilkinson & Monaghan, Inc.; the respondents, Hillcrest Healthcare Corporation, Hillcrest Medical Center Foundation, Hillcrest Real Estate, Inc., Hillcrest Service Company, Jerry Puls, M.D., Douglas Hubner, M.D., Jerry L. Puls, M.D., Inc., South Utica Pathology Laboratories, Inc., and Frederick Jones, M.D., Gary Breipohl, M.D., Jonathan Anthony, M.D., Robert Spohr, M.D., Thomas Singletary, M.D., Harold Voss, M.D., Dan Wiesemeyer, M.D., and Duane Brothers, M.D.

Drs. Jones, Breipohl, Anthony, Spohr, Singletary, Voss, Wiesemeyer and Brothers ("Anesthesiology defendants") have not been joined as respondents in this proceeding because petitioners believe they have no interest in its outcome.

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PETITION FOR WRIT OF CERTIORARI

To The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners Wilkinson and Monaghan and Bill V. Wilkinson (hereinafter "Petitioners") pray that a writ of certiorari issue to the Court of Appeals of the State of Oklahoma, Division Four, affirming in part sanctions imposed on petitioner pursuant to an Oklahoma statute, OKLA. STAT. tit. 12 §2011 (1991), while refusing to review an essential conclusion of law made by the trial court in imposing those sanctions, even though the trial court's conclusion had already been determined, prior to petitioners' sanctions hearing. The Oklahoma Supreme Court denied the petition for a writ of certiorari on this issue.

OPINIONS BELOW

The findings of fact and conclusions of law of the Honorable David L. Peterson, District Court of Tulsa County, Oklahoma, made in this case, appear in the Appendix, at APP. 32a-44a.[1] The opinion of the Court of Appeals of the State of Oklahoma, Division Four, in this case appears at APP. 1a-31a. The order of the Oklahoma

[1] References to the Appendix, infra, will be signaled as APP.___. References to the record before the District Court of Tulsa County will be signaled T.C. APP.___ and references to the record below before the Oklahoma Supreme Court and the Oklahoma Court of Appeals will be described by document title and filing date.

Supreme Court denying the petition for a writ of certiorari appears at APP. 58a-59a.

JURISDICTION

The jurisdiction of this Court is pursuant to 28 U.S.C. §1257.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves U.S. CONST. amend. XIV, §1, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves OKLA. STAT. tit. 12 §2011 (1991) which provides:

> SIGNING OF PLEADINGS.
>
> A. SIGNATURE. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in his individual name, whose Oklahoma Bar Association identification number shall be stated, or, if the party is not represented by an attorney, shall be signed

by the party. Each paper shall state the address of the signer and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless the omission of the signature is corrected promptly after being called to the attention of the attorney or party.

B. REPRESENTATIONS TO COURT. By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

1. It is not being presented for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation;

2. The claims, defenses and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

3. The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and,

4. The denials of factual contentions are warranted on the evidence or, if specifically

so identified, are reasonably based upon a lack of information or belief.

C. SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that subsection B of this section has been violated, the court shall, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subsection B of this section or are responsible for the violation.

1. HOW INITIATED.

a. By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subsection B of this section. It shall be served as provided in §2005 of this title, but shall not be filed with or presented to the court unless, within twenty-one (21) days after service of the motion or such other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

b. On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that

appears to violate subsection B of this section and directing an attorney, law firm or party to show cause why it has not violated subsection B of this section with respect thereto.

2. NATURE OF SANCTIONS; LIMITATIONS. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs a and b of this paragraph, the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys fees and other expenses incurred as a direct result of the violation.

a. Monetary sanctions shall not be awarded against a represented party for a violation of paragraph 2 of subsection B of this section.

b. Monetary sanctions shall not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

3. ORDER. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this section and explain the basis for the sanction imposed.

D. INAPPLICABILITY TO DISCOVERY. This section does not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Sections 3226 through 3227 of this title.

STATEMENT OF THE CASE

This case presents an important issue of procedural due process. That is, whether procedural due process, guaranteed by section 1 of the Fourteenth Amendment, is violated when sanctions are imposed on an attorney in a hearing before which the presiding state judge had already predetermined dispositive legal issues directly relating to the sanctions, thereby denying the attorney a neutral adjudicator.

Petitioner Bill V. Wilkinson is a member in good standing of the Oklahoma Bar and this Court. He is a member of petitioner law firm, Wilkinson & Monaghan, Inc., in Tulsa, Oklahoma.

Petitioners were retained by the personal representatives of the estate of Norma Levitt to pursue a medical malpractice claim. Mrs. Levitt died on the operating table while a patient at the Hillcrest Medical Center, Inc., in Tulsa following hip replacement surgery. The surgery was successful with no complications. After the completion of the surgery, however, a nurse determined that the patient should receive a blood transfusion and prior to the transfusion the blood was improperly heated in a conventional microwave oven located in the employee lounge. Such heating caused the blood to become toxic and the patient

died immediately after having received the blood. After more than three years of discovery, pretrial dispositive motions were filed by all defendants and the trial court denied the motions. A lengthy jury trial was held during which the trial judge made important evidentiary rulings. Plaintiff rested after seventeen days of trial. At that point, the trial court sustained demurrers on behalf of many of the defendants, including Hillcrest Healthcare Corporation, Hillcrest Real Estate Corporation, Hillcrest Medical Center Foundation, and Hillcrest Service Company ("Hillcrest defendants"), Jerry Puls, M.D., Douglas Hubner, M.D., Jerry L. Puls, M.D., Inc., South Utica Pathology Laboratories, Inc. ("Pathologist defendants"). The case was submitted to the jury against several other defendants, including Hillcrest Medical Center, Inc. The jury returned a verdict for the defendants. Petitioners then filed a motion for a new trial. However, by that time the estate had chosen to retain other counsel, who proceeded to settle the case with those defendants who prevailed before the jury, in exchange for foregoing an appeal.

Following the confidential settlement, the Hillcrest defendants and the Pathologist defendants sought sanctions against petitioners, alleging violations of OKLA. STAT. tit. 12 §2011 (1991). These defendants asserted that petitioners had violated §2011, either by improperly naming them in the lawsuit without any basis in law or fact or, assuming such a basis did exist, by failing to develop sufficient evidence to maintain a cause of action, at which point petitioners had the obligation to dismiss them from the suit. Relevant for purposes of this petition is the claim for sanctions due to petitioners' inclusion of the Hillcrest

defendants other than the Medical Center, Inc., even though they possessed distinct corporate identities. Petitioners' theory in naming these defendants was that they were the alter ego corporations of the Hillcrest Medical Center, Inc., established to receive assets diverted to them by the Center. At the trial, petitioners presented an expert witness, Dr. Wright, a highly qualified and experienced hospital administrator, who testified that there was "commonality" of personnel between the boards of directors of the various Hillcrest defendants. However, the trial court, over petitioners' objection, refused to allow the witness to testify further. (T.C. APP. 10,067 at pp. 3036-3037). Petitioners have contended throughout that had Dr. Wright been permitted to testify, at the very least the claims against the other Hillcrest defendants would have been submitted to the jury. (T.C. APP. 8225 at 8227; T.C. APP. 10,195 at 358; Petition in Error, Exhibit C thereto, ¶ 18, filed 5/11/94; Brief in Chief, p. 16, filed 12/23/94; Reply Brief, p. 13, filed 3/23/95; Petition for Rehearing, pp. 11-12, filed 10/16/95; Petition for Certiorari, p. 7, filed 12/8/95.) The claim for sanctions due to petitioners' inclusion of the Pathologist defendants is also relevant for purposes of this petition.

Prior to and during the sanctions hearing petitioner Wilkinson requested that the trial judge recuse himself because of the prejudice he had evinced toward petitioners during the trial and because of the important evidentiary rulings which now related directly to the sanctions. On July 7, 1993, petitioners requested that the trial judge disqualify himself in accordance with a local rule, which required that a private in camera request be made first before a motion is filed in order to provide the

trial judge the opportunity to voluntarily disqualify. The letter states as follows:

> Dear Judge Peterson:
>
> In accordance with Rule 15(a) of the Rules of the District Court, Tulsa County, we hereby submit this "in camera" request for you to disqualify with regard to any further deliberations regarding the law firm of Wilkinson & Monaghan.
>
> There are currently pending claims for fees and costs against the law firm in excess of $650,000.00. It would be in the best interest of everyone concerned for a completely neutral judge who has no background in this litigation to determine these important issues. As you can imagine, the determination of these issues is of vital importance to the law firm and may well mean, "life or death" to the firm. Thus, we want to insure that the adjudication process is completely objective.
>
> Any trial judge is placed in an inherently difficult position when ruling on fees and sanctions of the kind and nature brought against our law firm. This is true because the trial judge has, of course, already entered an Order dismissing certain defendants from the suit. Thus, to be asked subsequently whether such defendants should have properly been named in the first place calls upon the trial judge to use hindsight dating back to the time when the pleadings were filed. This is difficult under the best of circumstances and it is, we believe, impossible under the present situation in this case.
>
> Finally, Judge Peterson, please understand that we mean no disrespect for you personally or officially with regard to this matter. It is

apparent, moreover, that you are not and cannot be neutral with regard to the adjudication of these important issues. For this reason, therefore, we ask you by virtue of this "in camera" communication, to disqualify yourself in this litigation.

Thank you for your consideration in this matter.

Very truly yours,

WILKINSON & MONAGHAN

Bill V. Wilkinson

(T.C. APP. 10,196 at p. 320, Exhibit 7). By letter dated July 14, 1993, the trial court refused to disqualify, citing a failure to comply with Local Rule 15 as the sole reason for his refusal to disqualify.

Prior to the sanctions hearing, petitioners filed a motion asking the trial court to disqualify[2] (T.C. APP. 9686). Five days after the filing of the application and before the defendants responded and without the benefit of a hearing, the trial court denied the application with a

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[2] In their application to disqualify the trial judge, petitioners argued that Judge Peterson and members of his court staff have exhibited actions of bias and prejudice against petitioners (T.C. APP. 9687), that a discovery ruling by the trial judge "evidences prejudice against the [petitioners] and prevents the [petitioners] from receiving fundamental due process" (T.C. APP. 9690), and that the adjudication of the sanctions motion will require a determination of the propriety of the trial court's evidentiary ruling, and that such determination "must be made by an independent and neutral judge in order for the [petitioners] to be fairly judged and for the proceedings to have the appearance of propriety."

minute order (APP. 54a). The sole reason stated by the trial court for denial of the Motion to Disqualify was failure to comply with Local Rule 15(a). In the three-year history of the litigation, no other ruling on any motion or application by any party had ever been made by the trial court in so short a time without a hearing.

When the sanction hearing began, petitioners again raised the issue of disqualification with the trial court. (T.C. APP. 10,196, pp. 92-93). In their Petition in Error filed with the Oklahoma Supreme Court[3], petitioners alleged that the trial court committed error by refusing to recuse as the presiding judge in the sanctions hearing considering the nature and background of the case (Petition in Error filed on May 11, 1994, Exhibit C thereto, ¶ 1). In their Brief in Chief and Reply Brief to the Oklahoma Supreme Court, Petitioners demonstrated that the trial court was not impartial.[4]

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[3] Under Oklahoma law, every appeal filed with the Oklahoma Supreme Court is subject to assignment to the Oklahoma Court of Appeals. Thus, although petitioners filed their Petition in Error with the Oklahoma Supreme Court, the case was assigned to and initially decided at the appellate level by the Oklahoma Court of Appeals.

[4] See Brief in Chief filed on 12/23/94, pp. 24-28. Petitioners argued that the trial court applied the wrong legal standard to the imposition of sanctions because the trial court was not impartial (*Id.* p. 25) and had pre-judged the sanctions issue (*Id.* p. 28). See also petitioners' Reply Brief filed in the Oklahoma Supreme Court on 3/23/95, pp. 37, 39, 40. After demonstrating that the trial court used an improper standard for imposing sanctions, petitioners argued: "The conclusion one must reach is that the Trial Court was influenced by factors which should not have been relevant to the issue of sanctions, including what must be considered his lack of impartiality." *Id.* pp. 39, 40.

At the sanctions hearing, petitioners once again argued that the trial court had improperly excluded the further testimony of Dr. Wright at trial, but in making his findings of fact and conclusions of law the trial court failed even to consider this assertion, APP. 32a-44a, even though sanctions in favor of the dismissed Hillcrest defendants would clearly have been improper had the case against them been submitted to the jury, and petitioners contended throughout that had Dr. Wright's complete testimony been admitted this would have taken place. The trial court awarded each of the Hillcrest defendants and the Pathologist defendants $12,500 of their fees and costs as sanctions against petitioners in the total amount of $100,000.

On appeal to the Court of Appeals, petitioners once again asserted the trial court's error in failing to admit Dr. Wright's full testimony.[5] In its opinion affirming these sanctions, the Court of Appeals acknowledged that petitioners had made this assertion, but refused to review the trial court's evidentiary rulings regarding Dr. Wright's testimony, because "that allegation of trial error has been waived." APP. 15a. The opinion failed to elaborate, and it is clear that at no point did *petitioners* in any way waive that issue. The Court was presumably referring to the fact that petitioners' *clients* in the underlying medical malpractice action had waived the issue, by declining to appeal the demurrers as part of their settlement agreement.

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[5] See Petition in Error filed with the Oklahoma Supreme Court on May 11, 1994, Exhibit C thereto, ¶ 30; Brief in Chief filed on 12/23/94, p. 16; Reply Brief filed on 3/23/95 pp. 13-14.

With the testimony of Dr. Wright excluded, the Court of Appeals noted that "[w]e are left with a record containing the single bare allegation that the various Hillcrest Entities have some common board members." APP. 15a. The Court therefore affirmed the award of sanctions. APP. 31a. It was "led to the inescapable conclusions that Wilkinson's and the law firm's allegations against the Hillcrest entities were made without basis in fact, and that Wilkinson's repeated and successful attempts to keep them in the lawsuit after it was apparent that there was no basis in law or fact for their being there was a violation of OKLA. STAT. tit. 12 (1991) §2011." APP. 17a.

In their petition for a writ of certiorari to the Oklahoma Supreme Court, petitioners argued that the Court of Appeals' failure to review the trial court's conclusion concerning the inadmissibility of Dr. Wright's testimony violated their due process rights.[6] However, the Oklahoma Supreme Court denied the writ. APP. 58a.

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[6] Petitioners stated in their Petition for Writ of Certiorari that "[t]he Court of Appeals refused to consider petitioners' argument that the trial court had committed grievous errors in refusing to admit certain testimony that was crucial insofar as the Hillcrest entities and the pathologists were concerned. . . . Depriving petitioners of this issue also violates due process in the sense that the issue was raised at the earliest opportunity." (Petition for Writ of Certiorari filed on 12/8/95, pp. 7-8)

REASONS FOR GRANTING THE WRIT

I.

THE IMPOSITION OF SANCTIONS BY A JUDGE WHO HAD CONDUCTED THE TRIAL AND MADE EVIDENTIARY RULINGS RELATING TO THE SANCTIONED CONDUCT VIOLATES THE DUE PROCESS RIGHT TO A NEUTRAL ADJUDICATOR

This case presents a question of enormous theoretical and practical importance that has not yet been directly addressed by this Court: The applicability of a well established line of due process decisions of this Court to the methods used to adjudicate and assess sanctions upon attorneys. Petitioners respectfully submit that this is an issue which this Court should address, in order to remove any question that its cases finding that due process requires a truly neutral adjudicator apply with full force to the attorney sanctions area.

In *In re Murchison*, 349 U.S. 133 (1955), this Court held that the fact that the same judge who had sat as the Michigan "judge-grand jury" before which witnesses had testified also presided at those witnesses' contempt hearing for their conduct during the earlier proceeding violated due process. In so holding, the Court stated:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case. . . .
>
> 349 U.S. at 137.

The Court in *Murchison* relied on its previous holding in *Tumey v. Ohio*, 273 U.S. 510 (1927), that "[e]very procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." *Id.* at 532, quoted in 349 U.S. at 136. The Court acknowledged that "[s]uch a stringent rule may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' " 349 U.S. at 136, quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954). Applying these due process principles to the case before it, the *Murchison* Court concluded:

> Having been a part of [the accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of the zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.
>
> 349 U.S. at 137.

"As a practical matter," the Court reasoned, "it is difficult if not impossible for a judge to free himself from the influence of what took place in [the earlier proceeding]. His recollection of that is likely to weigh far more heavily with him than any testimony given in the open hearings." Id. at 138. *See also Taylor v. Hayes*, 418 U.S. 488 (1974) (another judge should have been substituted for trial

judge for purpose of finally disposing of contempt charges against counsel); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) (same); *Offutt v. United States*, 348 U.S. 11, 14 (1954) (concluding that a contempt determination "should have been made in the first instance by a judge not involved . . . in the petitioner's misconduct.").

This Court's decisions concerning the adjudication of contempt, along with those decisions involving the possibility of a financial interest in the outcome [*see, e.g., Tumey, supra; Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972)] and those concerning the requirement of an independent assessment of the need for a search warrant [*see, e.g., Coolidge v. New Hampshire*, 403 U.S. 443, 450 (1971)] ("prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations. . . . "), have established that due process requires a truly neutral adjudicator before an individual may be deprived of life, liberty or property. Such a requirement is dictated both by the utilitarian concern for the need for accurate decisionmaking [*Mathews v. Eldridge*, 425 U.S. 319 (1976)] and the dignitary interest in treating an individual in a fair manner. *See Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring) (even if a given procedure does not clearly advance the goal of accuracy, it may still be dictated by due process insofar as it "generate[s] the feeling, so important to a popular government, that justice has been done."); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("the requirement of neutrality in adjudicative proceedings safeguards . . . the promotion of participation and dialogue by affected individuals in the

decisionmaking process."). This is because "procedural safeguards are of no real value . . . if the decision maker bases his findings on factors other than his assessment of the evidence before him." Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455, 476 (1986). Moreover, "the ability to persuade presupposes a persuadable decisionmaker. . . . A system that holds itself out as promoting [the] value [of participation] cannot tolerate the input of a decisionmaker whose presence so dilutes the possibility of meaningful participation." Id. at 488. This Court has therefore recently described the right to a neutral adjudicator as "a mainstay of our system of government." *Gutierrez De Martinez v. Lamagno*, ___ U.S. ___, 115 S. Ct. 2227 (1995).

While to date this Court has not considered the applicability of these forceful precedents to the context of attorney sanction hearings, there exists absolutely no reason, in either logic or practicality, to doubt their relevance. The sanctions against petitioners of course constitute a deprivation of property, thereby triggering the procedural protections of the Due Process Clause. It is well accepted that due process limits the imposition of attorney sanctions.[7] Moreover, the trial judge in this case

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[7] *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766, 100 S. Ct. 2455, 2464, 65 L. Ed. 2d 488 (1980); *Schoenberg v. Shapolsky Publishers, Inc.*, 971 F.2d 926, 934-936 (2nd Cir. 1992); *Dodd Insurance Services, Inc. v. Royal Insurance Company of America*, 935 F.2d 1152, 1160 (10th Cir. 1991); *Securities Industry Association v. Clarke*, 898 F.2d 318 (2nd Cir. 1990); *In re Perry*, 918 F.2d 931, 935-936 (Fed. Cir. 1990), *cert. denied, Perry v. Amerace Corp.*, 502 U.S. 808, 112 S. Ct. 49, 116 L. Ed. 2d 27, *cert. denied, Pac-Tec, Inc.*

is, for purposes of due process, in much the same position as the judges in *Murchison* and all of the other cases in which a neutral adjudicator was held to be required. On the sanctions motion brought by the Hillcrest defendants, the trial judge had already made up his mind concerning the admissibility of Dr. Wright's testimony when he chose to exclude it during the original medical malpractice suit. By the time of petitioners' sanctions hearing, the trial judge could no longer be properly characterized as a "neutral" adjudicator on that question. He already was, at the very least, predisposed toward the view that the testimony was inadmissible (a fact underscored by his refusal even to respond to petitioners' assertion on that point in his findings of fact and conclusions of law). Thus, at the sanctions hearing, petitioners were forced to make their arguments to one who had already definitely ruled on them in a separate context.[8]

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v. Perry, 502 U.S. 808, 112 S. Ct. 50 (1991); *Julien v. Zeringue*, 864 F.2d 1572, 1575 (Fed. Cir. 1989); *Tom Growney Equipment, Inc. v. Shelley Irrigation Development, Inc.*, 834 F.2d 833, 836 (9th Cir. 1987); *In Re: Yagman*, 796 F.2d 1165, 1180, 1181 (9th Cir. 1986), *amended, rehr'g denied*, 803 F.2d 1085, *mandamus granted, Brown v. Baden*, 815 F.2d 575, *cert. denied, Real v. Yagman*, 484 U.S. 963, 108 S. Ct. 450, 98 L. Ed. 2d 390 (1987).

[8] It is true, of course, that petitioner Wilkinson had the opportunity to argue the claims against both the Hillcrest defendants and the Pathologist defendants during the medical malpractice suit on behalf of the representatives of the Levitt estate. However, this opportunity most certainly fails to satisfy due process requirements. At that time, no sanctions had been sought against petitioners; the arguments were made by petitioners in the context of a medical malpractice litigation *on behalf of their clients*. This opportunity, then, cannot in any way be deemed to satisfy petitioners' *own* due process right to

Similarly, in ruling on the sanctions motion brought by the Pathologist defendants, the trial judge could not be deemed a neutral adjudicator because he had already granted their demurrer at trial.

In asserting that the trial judge in this case failed to constitute the neutral adjudicator required by due process, the petitioners wish to emphasize three further points of great importance. First, petitioners do not contend that the trial judge lacked neutrality because of an abstract philosophical, ideological or legal bias or predisposition. The existence of such biases does not render an adjudicator constitutionally unacceptable, because to so hold would effectively disqualify virtually every judge – with the exception of those who had never given thought to any issue. Meaningful adjudication would thus be rendered all but impossible. In the words of Chief Justice Rehnquist, "[p]roof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." *Laird v. Tatum*, 409 U.S. 824, 835 (1972). But such acceptable *abstract* predispositions must be distinguished "from the type of bias that occurs when an individual adjudicates an issue with which she has had prior involvement, either in the position of an advocate *or as a judge in an earlier stage of the case*. The judge then has a strong motivation to hold that her initial decision was the correct one, and to a certain

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defend themselves against sanctions. That right could only be satisfied *at the sanction hearing itself* – by which time the trial judge was no longer a neutral adjudicator.

extent she acts as a judge in her own case." Redish & Marshall, *supra*, 95 Yale L.J. at 502-03 (emphasis added).

This is exactly the situation in the present case, just as it was in the contempt decisions of this Court. At the time of petitioners' sanctions hearing, the trial judge had considerably more invested here than merely some abstract bias or predisposition. He had himself already made important evidentiary rulings and had ruled on the merits in favor of the very parties seeking sanctions. At the sanctions hearing, he was effectively called upon to review the wisdom and correctness of his own prior rulings on the very same issues. He was, then, effectively acting as a judge in his own case.

Secondly, petitioners wish to emphasize that they do not in any way intend to suggest that the trial judge in this case consciously acted out of either a desire to avoid questioning his earlier rulings or any other improper motive. But as this Court's decisions quite clearly establish, no such showing is required in order to disqualify an adjudicator for purposes of due process. To the contrary, this Court emphasized in both *Murchison* and *Tumey* that it was making no finding concerning the motivations of the judges involved in those cases. As this Court stated in *Tumey*: "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would *offer a possible temptation to the average man as a judge* . . . denies . . . due process of law." 273 U.S. at 532 (emphasis added).

Finally, petitioners should note that the due process violation was rendered even more egregious as to the sanctions sought by the Hillcrest defendants because of the Court of Appeals' inexcusable refusal even to review the correctness of the trial judge's original refusal to admit Dr. Wright's testimony, an issue that was clearly outcome determinative as to the correctness of the imposition of sanctions against petitioners: The admissibility of Dr. Wright's testimony concerning the corporate connections between the Hillcrest Medical Center, Inc., and the other Hillcrest defendants. Thus, even if meaningful appellate review were found to satisfy the due process requirements of neutral adjudication, the availability of such review on this key issue was lacking in this case.

II.

THE DECISION OF THE COURT OF APPEALS NOT TO REVIEW THE TRIAL COURT'S EVIDENTIARY RULINGS RELATING TO THE SANCTIONS DOES NOT REST ON AN INDEPENDENT AND ADEQUATE STATE GROUND

It is well established that a state court's refusal to adjudicate an issue of federal law will preclude review in this Court if that refusal is based on an independent and adequate state law ground. In the present case, however, the refusal by the Oklahoma Court of Appeals to review the trial court's evidentiary rulings on the ground that "that allegation of trial error has been waived", APP. 15a, does not constitute such an independent and adequate state ground.

Though the Court of Appeals' opinion is unclear as to exactly at what point waiver had been made, the Court could not possibly have been referring to any waiver *on the part of petitioners.* To the contrary, petitioners had raised the trial judge's error in ruling Dr. Wright's full testimony inadmissible at every level of the sanctions process. (T.C. APP. 8225 at 8227; T.C. APP. 10,195 at 358; Petition in Error, Exhibit C thereto, ¶ 18, filed 5/11/94; Brief in Chief, p. 16, filed 12/23/94; Reply Brief, p. 13, filed 3/23/95; Petition for Rehearing, pp. 11-12, filed 10/16/95; Petition for Certiorari, p. 7, filed 12/8/95.) The only waiver to which the opinion could conceivably have been referring, then, is the waiver by the plaintiffs in the underlying medical malpractice action, resulting from their agreement not to appeal. But surely, that waiver cannot prejudice petitioners in their sanctions proceeding. Petitioners by no means share an identity of interests with the plaintiffs in the underlying medical malpractice action. Indeed, by the time they made their decisions not to appeal the trial court's rulings, the medical malpractice plaintiffs had already fired petitioners and replaced them with new counsel. T.C. APP. 8066A. The Court of Appeals, then, was improperly confusing waiver by the medical malpractice plaintiffs in the underlying action with waiver by petitioners in the sanctions proceeding, a confusion lacking any basis in either law or fact.

This Court has uniformly held that a state procedural ground will not serve as an independent and adequate state ground upon which to avoid resolution of a federal issue when that state procedural ground "prevents implementation of the federal right" and the state rule fails to "serve[ ] a legitimate state interest." *Henry v. Mississippi,*

379 U.S. 443, 447 (1965). *See also Douglas v. Alabama*, 380 U.S. 415 (1965). Moreover, use of a state procedural rule to preclude review of a federal claim will fail if it lacks "fair or substantial support." *See, e.g., Rogers v. Alabama*, 192 U.S. 226 (1904). This is true, even if the state court's refusal is the result of irrationality, rather than of the ulterior motive of avoiding resolution of a federal issue. Alfred Hill, *The Inadequate State Ground*, 65 Colum. L.Rev. 943, 959 (1965) ("If the state determination standing in the way of a federal claim is deemed to be arbitrary (i.e., one which is utterly irrational, considering the conceded premises and the presumed honesty of the state judges), that should be reason enough for disallowing it. . . . ").

In the present case, the state court's wholly unfounded finding of waiver cannot be allowed to preclude this Court from assuring that petitioners' constitutional rights are protected.

CONCLUSION

This case presents a situation in which petitioners have been deprived of their property without ever having had the opportunity to challenge the basis for that deprivation before a neutral adjudicator. The fact of this injustice in and of itself warrants this Court's intervention to remedy such an unambiguous violation of constitutional right. Moreover, this case presents this Court with the opportunity to clarify, once and for all, the important intersection between this Court's decisions requiring a neutral adjudicator on the one hand and the adjudicatory

methodology employed in the pervasive system of attorney sanctions throughout the nation, on the other. For these reasons, petitioners respectfully request this Court to grant their writ of certiorari.

Respectfully submitted,

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RELEASED FOR PUBLICATION BY ORDER OF
THE COURT OF APPEALS

IN THE COURT OF APPEALS
OF THE STATE OF OKLAHOMA

DIVISION FOUR

WILLA WARNER, LINDA JONES, and MERLE LEVITT, Personal Representatives of the Estate of Norma Levitt, Deceased,	)	
Plaintiffs,	)	No. 83,555
vs.	)	FOR PUBLICATION
HILLCREST MEDICAL CENTER, a corporation, ROBERT MORTON, M.D., CHRISTINE JONES, CRNA, and TULSA ANESTHESIOLOGISTS, INC., an Oklahoma corporation,	)	(Filed Sep. 26, 1995)
Defendants,	)	
and	)	
HILLCREST HEALTHCARE CORPORATION, HILLCREST MEDICAL CENTER FOUNDATION, HILLCREST REAL ESTATE, INC., HILLCREST SERVICE COMPANY, FREDERICK JONES, M.D., GARY BREIPOHL, M.D., JONATHAN ANTHONY, M.D., ROBERT SPOHR, M.D., THOMAS SINGLETARY, M.D., HAROLD VOSS, M.D., DAN	)	

WIESEMEYER, M.D., JERRY PULS, M.D., DOUGLAS HUBNER, M.D., DUANE BROTHERS, M.D., JERRY L. PULS, M.D., INC., and SOUTH UTICA PATHOLOGY LABORATORIES, INC.,

Appellees,

and

WILKINSON AND MONAGHAN, a Professional Corporation, and BILL V. WILKINSON,

Appellants.

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

Honorable David L. Peterson, Trial Judge

Medical malpractice action against twenty-one defendants for death of patient after hospital employees administered transfusion with blood warmed in kitchen microwave. Following a defendants' verdict, sixteen defendants sought and received award of sanctions totaling $200,000 for alleged violations of 12 O.S.1991 § 2011. Attorney appeals.

AFFIRMED IN PART AND REVERSED IN PART

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Joseph A. Sharp John H.T. Sheridan Karen M. Grundy Best, Sharp, Holden, Sheridan, Best & Sullivan Tulsa, Oklahoma	For Appellees Gary Breiphol, M.D., Jonathan Anthony, M.D., Robert Spohr, M.D., Thomas Singletary, M.D., Harold Voss, M.D., Dan Wiesemeyer, M.D., and Duane Brothers, M.D.
Stephen J. Rodolf Karen L. Callahan Barkley, Rodolf & McCarthy Tulsa, Oklahoma	
Tony Jack Lyons Lyons & Lyons Pryor, Oklahoma	For Defendants/Appellees Jerry Puls, M.D., Douglas Hubner, M.D., Jerry L. Puls, M.D., Inc., and South Utica Pathology Laboratories, Inc.

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For Appellants Wilkinson & Monaghan, Inc. and Bill V. Wilkinson

OPINION

GOODMAN, P.J.

Appellants Wilkinson & Monaghan, a Professional Corporation (law firm), and Bill V. Wilkinson, an individual, appeal from the trial court's order awarding sanctions to multiple defendants against the law firm and Wilkinson.

I Facts

Wilkinson and his law firm (hereinafter Wilkinson) were retained by the personal representatives of the estate of Norma Levitt to pursue a medical malpractice claim. Norma Levitt died on the operating table at Hillcrest Medical Center in Tulsa, Oklahoma, on November 8, 1989, following successful hip replacement surgery. A nurse anesthetist gave Levitt a unit of Levitt's own blood which had been warmed in a microwave oven located in the employees' lounge.[1] Wilkinson alleged the negligent

[1] Heating blood in this manner destroys the red blood cells, resulting in "gross hemolysis" of the blood, releasing large amounts of potassium. Excessive potassium, when introduced into the body, is often fatal. The practice of warming

introduction of this blood into Levitt's system was a direct cause of her death minutes later. The defendants argued that Levitt died from a blood clot, rather than the hemolyzed blood. Wilkinson's first petition named only Hillcrest Medical Center as defendant. The petition was amended over 15 months later, on November 8, 1991, to include twenty additional individual and corporate defendants.[2]

A jury trial was held, following more than three years of discovery. The trial lasted over three weeks. After seventeen days of trial, the plaintiffs rested. The trial court sustained demurrers by Drs. Jones, Breipohl, Anthony, Spohr, Voss, Wiesemeyer, Puls, Hubner and Brothers. Demurrers on behalf of South Utica Pathology Lab, Jerry L. Puls, M.D., Inc., Hillcrest Health Care Corporation, Hillcrest Real Estate Corporation, Hillcrest Medical Center Foundation, and Hillcrest Service Corporation were also sustained. Demurrers by Hillcrest Medical Center, Drs. Morton and Singletary, Christine Jones, C.R.N.A., and Tulsa Anesthesiology, Inc., were overruled.[3] The case was submitted to the jury against Dr. Morton, Christine Jones, C.R.N.A., Tulsa Anesthesiology, Inc., and Hillcrest Medical Center, Inc., only. A defendants' verdict was returned.

Intravenous (IV) fluids, other than blood, in the microwave was an accepted practice at Hillcrest Medical Center, as reflected in its written procedures.

[2] Dr. Kim Zarintash, M.D., was later dismissed without prejudice.

[3] Dr. Singletary's demurrer was later reconsidered and sustained, leaving only four defendants.

Wilkinson and the law firm filed a motion for new trial. In the meantime, Levitt's estate fired Wilkinson and the law firm, and retained other counsel. The new counsel was able to settle the case against the final four remaining defendants in exchange for foregoing an appeal. None of the issues raised at trial are before us today. The evidentiary and procedural rulings made by the trial judge are not raised on appeal. We will therefore indulge in the presumption that those rulings were correct.

Following the confidential settlement, the non-settling defendants who had earlier been dismissed by the trial court applied for sanctions against Wilkinson and the law firm, alleging violations of 12 O.S.1991 § 2011. Following a two-day hearing, the trial court entered an order on April 11, 1994, which consisted of detailed findings of fact and conclusions of law. The order gave judgment in favor of the sixteen moving defendants in the sum of $12,500 per defendant, for a total judgment against Wilkinson and the law firm of $200,000.

It is from this order Wilkinson and the law firm appeal. Wilkinson's petition in error sets out fifty-three propositions of error. Wilkinson's brief preserves but one: whether or not the sanctions levied were an abuse of the trial court's discretion. Except for those propositions of error set out in the petition in error which are included within the single briefed issue, the balance of the propositions of error are deemed waived. *Hadnot v. Shaw,* 826 P.2d 978 (Okla. 1992); *American First Abstract Co. v. Western Information Systems, Inc.,* 735 P.2d 1187 (Okla. 1987); *State ex rel. Remy v. City of Norman,* 642 P.2d 219 (Okla.

1981). All other allegations of error which occurred during the course of the trial itself are deemed waived, as no appeal from the jury verdict has been perfected.

II Section 2011 Sanctions

The applicable portions of 12 O.S.1991 § 2011,[4] read:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The appellees essentially contend that Wilkinson violated § 2011 either by improperly naming them in the lawsuit without any basis in law or fact or, presuming

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[4] Section 2011 is adopted almost verbatim from Fed. Rules Civil Proc. Rule 11, 28 U.S.C.A.

such a basis in law or fact initially existed, Wilkinson was unable to develop sufficient evidence to maintain a viable cause of action against them, at which time he had the obligation to dismiss them from the lawsuit. Title 12 O.S.1991 § 2011, is adopted from its federal counterpart, Fed. Rules Civ. Proc. Rule 11, 28 U.S.C.A. Therefore, we are permitted to review appropriate federal caselaw to aid in our interpretation and application of this rule to the facts in this case. *Unit Petroleum Co. v. Nuex Corp.*, 807 P.2d 251 (Okla. 1991).

III Standard of Review

The standard of review is whether the trial court abused its discretion in imposing sanctions. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990); *Broadwater v. Courtney*, 809 P.2d 1310 (Okla. 1991); *Berko v. Willow Creek I Neighborhood Ass'n, Inc.*, 812 P.2d 817 (Okla. Ct. App. 1991). Whether or not the acts of an attorney are done in good faith is no longer the test. " '[T]he new test represents an intentional abandonment of the subjective focus of [§ 2011] in favor of an objective one.' 'Simply put, *subjective good faith no longer provides the safe harbor it once did.*' 'There is no room for a pure heart, empty head defense under [§ 2011].' " *First National Bank and Trust Company of Vinita v. Kissee*, 859 P.2d 502, 512 (Okla. 1993) (emphasis in original) (footnotes omitted). "Rule 11 *requires* lawyers to think first and file later, on pain of personal liability." *Stewart v. RCA Corp.*, 790 F.2d 624, 633 (7th Cir. 1986). There is a duty to dismiss lawsuits when it becomes apparent there is no viable claim against a named defendant. *See Flip Side Productions, Inc. v. Jam Productions Ltd.*, 843 F.2d 1024 (7th

Cir. 1988). The advisory committee notes to Fed. Rules Civ. Proc. Rule 11, 28 U.S.C.A., lend insight to the application of sanctions.

> The rule continues to require litigants to "stop-and-think" before initially making legal or factual contentions. It also, however, emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable. . . . [This duty continues and is] not measured solely as of the time [the allegations] are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit. . . . Moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention.

The imposition of sanctions, on the other hand, should not be used to punish parties with unpopular claims.

> The standard for bad faith awards is stringent, for "[o]therwise those with colorable, albeit novel, legal claims would be deterred from testing those claims in a federal court." . . .
>
> The defendant seeking fees must not only prevail on the merits, but must also "show plaintiff pursued the litigation in bad faith or brought a frivolous, unreasonable, or groundless action." . . .
>
> Simply because the facts are found against a party "does not by itself prove that threshold of irresponsible conduct for which a penalty

> assessment would be justified." . . . A non-prevailing party should not be penalized for merely prosecuting or defending a lawsuit. (Citations omitted.)

U.S. Industries, Inc. v. Touche Ross & Co., 854 F.2d 1223, 1241 (10th Cir. 1988) (citations omitted).

Title 12 O.S.1991 § 2011, encourages colorable, yet novel, claims by prohibiting sanctions for "a good faith argument for the extension, modification, or reversal of existing law."

With these guidelines in mind, we proceed to analyze the facts and law.

IV Allegations of Violations of 12 O.S.1991 § 2011

Wilkinson made allegations against twenty-one defendants, sixteen of whom seek sanctions. These sixteen defendants can be categorized into three different groups, each with a distinct theory of negligence lodged against it. We will examine the allegations made against each group of defendants, determine if Wilkinson violated § 2011 in pursuit of claims against that group, and make a final determination as to whether the trial court's entry of sanctions on behalf of that group was properly supported by the evidence.

A review of the voluminous record reveals certain facts common to all three groups. One and one-half years elapsed between the filing of the plaintiffs' original and amended petitions. Over 30 depositions were conducted, and scores of documents were exchanged during that time. Wilkinson testified at the hearing on sanctions that

he conducted extensive research and engaged in various conversations with other attorneys and medical experts prior to filing suit. At the sanctions hearing, none of the defendants questioned Wilkinson as to what specific inquiries had been made prior to the filing of his amended petition. In fact, many of the defense counsel who testified against Wilkinson merely "assumed" that Wilkinson conducted no prefiling inquiry. None of them claimed to have any personal knowledge of what prefiling research was in fact done. Yet, much of the focus of their quest for sanctions was based on the alleged lack of a prefiling investigation sufficient to justify the filing of a claim against the defendants.

As we interpret § 2011 and the caselaw regarding sanctions, we must make an objective determination as to whether Wilkinson had a reasonable basis to include a particular defendant and then determine whether, if such an initial basis existed, there was sufficient evidence produced during the course of discovery to keep the defendant in the lawsuit. In light of the cases set out above, it is not relevant to our analysis whether Wilkinson successfully proved his allegations at trial, or whether he was even able to introduce evidence at trial in support of such allegations. Our concern is whether the attorney had a reasonable, objectively ascertainable basis to file and maintain the allegations made against the defendants. If at any point in this inquiry we find either that Wilkinson had no reasonable basis in fact or law to initially file the claim, or that after filing the claim he could not produce evidence which would reasonably support the continuation of the claim, we will not hesitate to affirm the trial court's imposition of proper sanctions. However, we will

not uphold sanctions for ineffective or even poor presentation of an otherwise viable claim. Sanctions are not penance for the sins of being on the losing side of a ruling or presenting a novel theory of recovery if it is supported by a good faith argument for the extension, modification or reversal of existing law.

A. Claims against the Hillcrest entities

Wilkinson and the law firm filed a petition against Hillcrest Medical Center (HMC) on July 17, 1990. On November 8, 1991, Wilkinson amended his petition to include Hillcrest Healthcare Corporation, Hillcrest Medical Center Foundation, Inc., Hillcrest Real Estate, Inc., and Hillcrest Service Company. Wilkinson's amended petition alleged that all these corporations "operate a medical facility in Tulsa County known as Hillcrest Medical Center."

According to the affidavit of the President and Chief Executive Officer of both Hillcrest Health Care Corporation and Hillcrest Medical Center, Hillcrest Health Care Corporation is the parent company of all the named Hillcrest defendants, including Hillcrest Medical Center. All of these entities, including Hillcrest Medical Center, are "wholly-owned [sic] subsidiaries of Hillcrest Health Care Corporation, an Oklahoma not-for-profit corporation." It is undisputed that only Hillcrest Medical Center rendered any medical treatment to Levitt. For purposes of this opinion, the parent corporation, Hillcrest Health Care Corporation and all its subsidiaries, except for Hillcrest Medical Center, will be referred to as the Hillcrest Entities.

Wilkinson's theory of recovery against Hillcrest Medical Center (HMC) was based on alleged negligence in the supervision of its employees or those medical service providers who, while technically not employed by HMC, were, nevertheless, under its direction and control. The jury rendered judgment in favor of HMC on this theory. HMC did not request sanctions against Wilkinson. Any issues surrounding the claims against HMC are not before us.

Wilkinson's theory of recovery against the Hillcrest Entities was based on the allegation that the Entities were the alter ego corporations of HMC set up to receive assets diverted to them by HMC. Wilkinson stated his theory of recovery as follows: "We have alleged agency. The truth of the matter is that there is an interwoven, interconnecting relationship between all of the defendants which will render them liable and share ownership of equipment and all kinds of different things. . . . "

This theory was subjected to repeated evidentiary attacks by the Hillcrest Entities, which first filed a Motion to Drop Misjoined Parties on December 5, 1991. In response, Wilkinson successfully defeated this motion by referring to the allegations contained in his amended petition, essentially arguing that each separate, named entity was in fact an agent of the others. Wilkinson seems to argue that each of the Hillcrest Entities was in fact an agent of the other named individual defendant doctors and that each Hillcrest Entity "maintained and exercised the right to control the actions and conduct of all such persons [the allegedly negligent doctors] and they are vicariously liable for their actions under the doctrine of

respondeat superior." At a hearing on this motion, Wilkinson was told by the court that "for an attorney to continue to sign pleadings and sue people that don't need to be sued and shouldn't be sued would be a violation of the rules. So if that develops, I'll expect you to take care of that, or I'll have to. If it doesn't develop, that's fine too."

The Hillcrest Entities later filed a motion for summary judgment on August 31, 1992, again seeking their dismissal. In his response to the motion, Wilkinson presented an affidavit by Dr. Miller-Hardy, Ph.D., which indicated that she would testify concerning the relationship between the Hillcrest Entities and HMC in a manner which would be sufficient to support Wilkinson's allegations of agency. The affidavit of Miller-Hardy merely states: "I believe the other entities had the right to and did exercise control over Hillcrest Medical Center. . . . " There is no further proof of an agency relationship other than this "belief." At the hearing on the motions for summary judgment, the trial court inquired about the depth of Miller-Hardy's knowledge as it pertained to the Hillcrest Entities. Wilkinson assured the court of Miller-Hardy's ability to prove agency between HMC and the Hillcrest Entities. The court said, "My question is: Have you done that in good faith and do you know that she knows?" Wilkinson replied, "Yes sir. Yes to both of those. I have done it in good faith. Yes, sir, I do know that she knows." Wilkinson went on to say "we will show it in the witness stand and to the jury." The court warned Wilkinson that "[Y]ou better be able to do so . . . or I will give you sanctions." Wilkinson assured the court he had sufficient evidence to support his claims. The trial court left

the Hillcrest Entities in the lawsuit based upon Wilkinson's promise to produce evidence.

At trial, however, Wilkinson did not call Miller-Hardy to testify. Instead, Wilkinson presented the trial testimony of Dr. Wright, who testified there was "commonality" of personnel between the board of directors of the various Hillcrest Entities and HMC. The focus of Wright's testimony was on the accreditation process and the adoption of certain standards of care at Hillcrest Medical Center, but had little or nothing to do with the Hillcrest Entities or their relationship to each other. The trial court did not permit Wright to testify further concerning the interrelationship between Hillcrest Medical Center and the Hillcrest Entities, as it was clear the witness' familiarity with those entities was limited, and thus lacked sufficient foundation to be used as a basis of expert opinion. While Wilkinson's brief on appeal claims this evidence was improperly excluded, that allegation of trial error has been waived. We are left with a record containing the single bare allegation that the various Hillcrest Entities have some common board members. We have reviewed the deposition transcript of Dr. Wright taken June 27, 1992, which was opened and reviewed by the trial court. The pre-trial testimony of Dr. Wright is critical of some of the Anesthesiologists, but contains no opinions on the relationship between Hillcrest Medical Center and the Hillcrest Entities. Indeed, Wilkinson has not pointed out any such references to this court in any of his briefs.

As we understand Wilkinson's theory of liability, based on the evidence in the record and Wilkinson's

testimony at the sanctions hearing, the focus of this theory was two-fold: that the Hillcrest Entities were to be held liable for the negligent acts of HMC, a sibling subsidiary corporation; and that Hillcrest Health Care Corporation was responsible as a parent corporation for the negligent acts of its subsidiary, HMC, by virtue of respondeat superior or an agency relationship. We find no basis in law for such allegations. It is clear that had one of the subsidiaries committed a tort, the parent company, presuming proof the subsidiary was in fact an alter ego of the parent, could also be held accountable.[5] The liability would not flow, however, to other sibling subsidiary corporations. The doctrine of respondeat superior has its roots in master-servant/employer-employee cases, not corporate responsibility. Agency is likewise an employer/employee doctrine, but it requires proof of both an agent and a principal and an express or implied agreement for

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[5] The general rule is that a corporation is a distinct legal entity separate and apart from other legal entities or stockholders. *Gulf Oil Corp. v. State*, 360 P.2d 933 (Okla. 1961). However, this legal fiction may be avoided if it is established that the separate corporate existence is a design or scheme to perpetuate a fraud or where a corporation is so organized and controlled and its affairs so conducted that it is merely an instrumentality or adjunct of another. *Wallace v. Tulsa Yellow Cab Taxi & Baggage Co.*, 178 Okla. 15, 61 P.2d 645 (1936); *Oklahoma Oil & Gas Exploration Drilling Program 1983-A v. W.M.A. Corp.*, 877 P.2d 605 (Okla. Ct. App. 1994). "Oklahoma permits the court to disregard the corporate entity if used, (1) to defeat public convenience, (2) justify wrong, (3) to perpetrate fraud whether actual or implied, or (4) to defend crime." *Robertson v. Roy L. Morgan Production Co.*, 411 F.2d 1041, 1043 (10th Cir. 1969) (citations omitted). *See also Matter of Estate of Rahill*, 827 P.2d 896 (Okla. Ct. App. 1991).

the former to act on behalf of the latter. Wilkinson has failed to produce any evidence to prove who was the principal and who was the agent or the existence of such a relationship. There is no evidence which would establish that the parent/subsidiary corporations were so closely linked and so inextricably intertwined as to be effectively one entity. The showing of a common board of directors and a unity of corporate purpose is insufficient to pierce the corporate veil. *Wallace v. Tulsa Yellow Cab Taxi & Baggage Co.*, 178 Okla. 15; 61 P.2d 645 (1936). We have meticulously reviewed the record to find evidence introduced by Wilkinson to prove his allegations of inter-corporate agency and an agency relationship between HMC, the Hillcrest Entities, and the individual defendant physicians as alleged by Wilkinson. We find no objective convincing evidence of such.

Having reviewed the voluminous trial court record, the briefs of the parties, the affidavits and evidence, and applying the law set out above, we are led to the inescapable conclusions that Wilkinson's and the law firm's allegations against the Hillcrest Entities were made without basis in fact, and that Wilkinson's repeated and successful attempts to keep them in the lawsuit after it was apparent that there was no basis in law or fact for their being there was a violation of 12 O.S.1991 § 2011. While we find no proof by the Hillcrest Entities that Wilkinson failed to conduct a pre-filing investigation, we do find there is no objective, reasonable basis to conclude that Wilkinson had a colorable claim against these corporate entities. Assuming arguendo there initially existed such a basis, it is clear that Wilkinson produced no evidence to

support the continuation of the lawsuit against the Hillcrest Entities.

We have examined the evidence presented by the Hillcrest Entities in support of their quest for sanctions, and find the evidence supports the trial court's findings of fact and conclusions of law, and the trial court properly awarded sanctions against Wilkinson and his interest in the law firm in favor of the Hillcrest Entities.[6] Wilkinson does not preserve as an issue the amount of sanctions; merely the imposition of them. We therefore affirm the award of sanctions in the amount of $12,500 each to Hillcrest Health Care Corporation, Hillcrest Medical Center Foundation, Hillcrest Service Company and Hillcrest Real Estate, Inc.

B. Claims against Anesthesiologists

Wilkinson's amended petition added as defendants the following anesthesiologists: Drs. Morton, Jones, Breipohl, Anthony, Spohr, Singletary, Voss, Wiesemeyer, and Brothers (Anesthesiologists), and Tulsa Anesthesiologists, Inc. The Anesthesiologists were the individual shareholders of Tulsa Anesthesiologists, Inc. Of these individuals, only two had any significant connection with

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[6] The trial court awarded sanctions "against Mr. Bill V. Wilkinson personally, and against his interest within the law firm of Wilkinson & Monaghan." The trial court correctly noted that sanctions levied against the law firm itself are prohibited in Oklahoma. *Unit Petroleum Co. v. Nuex Corp.*, 807 P.2d 251 (Okla. 1991).

the Levitt operation: Dr. Morton, who actually administered or supervised the giving of anesthesia to Mrs. Levitt, and Dr. Jones, who attempted resuscitation of Mrs. Levitt following the blood transfusion.[7] Of the remaining individual doctors, none ever had any direct connection with Levitt's medical care.[8] Wilkinson alleged that because of substandard training by the individual anesthesiologists, it was common for the nurses and staff to warm IV solutions in a microwave oven, rather than use the slower, but safer, blood warmers that were available. It was only a matter of time, Wilkinson alleged, that these same people would warm blood in a microwave, as well as IV solutions. Wilkinson presented evidence that the practice of microwaving IV solutions was the topic of a study at Hillcrest. In fact, Abbot Laboratories, the manufacturer of the IV solutions, mailed Hillcrest a letter containing a statement that microwaving the solutions was not recommended. Wilkinson's evidence showed that any

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[7] Additionally, Dr. Singletary assisted Dr. Jones during the resuscitation attempt, and Dr. Voss performed the pre-operative evaluation of Norma Levitt.

[8] In fact, Dr. Spohr was on vacation the date of the surgery, and Dr. Brothers had retired from the Corporation forty-five days preceding the operation. At first glance, it may appear Dr. Brothers was never a proper party to the suit. Because, however, we understand Wilkinson's theory of liability to be critical not only of the IV warming procedures themselves, but also of the role the professional corporation of anesthesiologists played in the development of standards resulting in those procedures, and because Dr. Brothers was a shareholder and participant in the Corporation at the time those IV warming protocols were adopted, Dr. Brothers is arguably causally connected to Levitt's death under the dangerous condition theory urged by Wilkinson.

of the Anesthesiologists had the authority to question and stop the practice of microwaving IV solutions at Hillcrest. Wilkinson contends they had an affirmative duty to do so. The fact none of the Anesthesiologists questioned or stopped this practice from occurring, despite their superior knowledge that the practice was questionable, became the basis for Wilkinson's allegations against all the Anesthesiologists, despite their lack of a direct doctor/patient relationship to Mrs. Levitt. Wilkinson alleged that the Anesthesiologists violated a duty to Mrs. Levitt by allowing a dangerous condition to exist which they were in a position to correct but failed to do so.

The plaintiffs' expert witness, Dr. Larson, an anesthesiologist and professor of anesthesia and neurosurgery from Stanford University, testified in his deposition on August 14, 1992, that all the Anesthesiologists in general, and Dr. Morton in particular, had deviated below a national standard of care by not prohibiting the warming of blood in a microwave oven. At trial, this witness was again asked whether all the Anesthesiologists were negligent for their failure to intervene. The Anesthesiologist defendants objected, claiming such criticisms were a surprise as those criticisms had not been raised in the "discovery" deposition. Wilkinson responded by claiming the witness was in fact critical of all the individual physicians in his deposition. Indeed, the trial court recognized that "this witness gave some broad things in his deposition that could have been delved into by defense counsel if they individually had any responsibility or did anything wrong in the cause – in causing the death of Norma Levitt." After repeated objections were made by defense

counsel that they were surprised by Dr. Larson's specific criticisms of each Anesthesiologist, the trial court again noted that "[H]is opinions were to all anesthesiologists. If you want to know who 'all' was, you could have asked in the deposition, but I want it related to this case, not just some broad thing out there." Larson went on to criticize the inadequate training of the nurse anesthetist and the circulating nurse. Dr. Larson was asked the following question:

> Q. (by Mr. Wilkinson) What do you believe that Dr. Fred Jones should have done that he did not do with regard to Norma Levitt, please?
>
> [objections by Dr. Jones' counsel overruled]
>
> A. Dr. Jones failed to recognize the potential risks of warming IV solutions in the standard microwave in the coffee room in the lounge.
>
> He failed to recognize the flaws in the study that was done of IV solutions and the temperatures after microwaving. And I have a series of flaws in that study that Dr. Jones should have known would invalidate the study and make it meaningless with respect to the microwaving of IV solutions.

Although not as specific, this answer reflects the criticisms Larson had against each of the individual Anesthesiologists.

Following the plaintiffs, case in chief, the demurrers of all the Anesthesiologists, except Dr. Morton and Tulsa Anesthesiologists, Inc., were sustained. The jury returned a verdict in favor of Dr. Morton and Tulsa Anesthesiologists, Inc.

Because Dr. Morton and Tulsa Anesthesiologists, Inc.,[9] did not seek sanctions, we do not address the evidence relating to their actions. We are primarily concerned with whether or not Wilkinson had any objective basis to maintain an action against the other Anesthesiologists.

At the sanctions hearing, the Anesthesiologists argued that because there was no doctor-patient relationship between them and Mrs. Levitt they were improperly brought into the suit. They contend "it is painfully obvious that Wilkinson had no viable theory upon which to sue these individual anesthesiologists, nor did he ever have the evidence necessary to maintain a claim against [them]." We disagree.

Section 2011 specifically contemplates actions that are "well grounded in fact and [are] warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that [are] not interposed for any improper purpose . . . . " Wilkinson sought to hold the non-treating Anesthesiologists liable in tort to Levitt on the theory they allowed an unreasonably dangerous condition to exist by not prohibiting the warming of any IV solutions and, by extension, blood, in a kitchen microwave. The Anesthesiologists' brief continually points out that Wilkinson's theory of liability is not warranted by existing law. Assuming arguendo this is true, it still does not account for that portion of the rule which allows a claimant to expand the

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[9] Christine Jones, CRNA, likewise did not seek sanctions.

boundaries of case law by advocating a good-faith argument for the extension, modification, or reversal of existing law. Sanctions should not be used to chill new theories of recovery that are now novel, but may one day become recognized. We note that the theory of allowing the existence of an unreasonably dangerous condition is a common theory in premises liability cases and in general tort cases.[10] While we have not found it to be a theory used often in the reported medical negligence cases, that is not to say advancement of this theory is totally without merit in such a novel context. While we do not offer an opinion on the viability of such a theory, we have found sufficient objective evidence in the record to support the advocation of such a theory. We agree that, for whatever reason, that theory was insufficiently supported by admissible evidence at trial and was thus unable to withstand a demurrer. The fact the theory against these particular defendants ultimately fell short, due to evidentiary and procedural infirmities, of the necessary prima facie proof to require submission of that theory to the jury does not retroactively make the entire theory frivolous or without a reasonable basis in law.

Thus we hold that the trial court abused its discretion in granting sanctions against Wilkinson as to these defendants. We wish to point out that while this court does not

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[10] *See Grover v. Superior Welding, Inc.*, 893 P.2d 500 (Okla. 1995); *Tansy v. Dacomed Corp.*, 890 P.2d 881 (Okla. 1994); *McKinney v. Harrington*, 855 P.2d 602 (Okla. 1993); *Chase v. Parry*, 326 P.2d 809 (Okla. 1958); *Robison v. Stokes*, 882 P.2d 1105 (Okla. Ct. App. 1994).

condone the naming of unnecessary defendants, and condemns the "shotgun" approach to naming defendants, we have scrutinized this voluminous record with the knowledge that novel theories of law are often pled inefficiently at first. We recognize the law to be a dynamic evolving body which must make room for theories that are often at first unpopular or misunderstood. A review of manufacturers product liability law before *Kirkland v. General Motors Corp.*, 521 P.2d. 1353 (Okla. 1974), would have led to a conclusion that it would have been sanctionable to bring in multiple manufacturing defendants involved in introducing a product into the stream of commerce. The evolution of this body of law would have proved such an initial conclusion erroneous.

We therefore vacate the portion of the order awarding sanctions to defendant Drs. Jones, Breipohl, Anthony, Spohr, Singletary, Voss, Wiesemeyer, and Brothers (Anesthesiologists).

C. Claims against Pathologists

Wilkinson named Dr. Puls, Dr. Hubner, Jerry L. Puls, M.D., Inc., and South Utica Pathology Laboratories, Inc. (Pathologists) as defendants. He alleged these defendants were in charge of establishing and overseeing the procedures used in the blood bank at Hillcrest.

Wilkinson's cause of action against the Pathologists is similar to that lodged against the Anesthesiologists: allowing a dangerous condition to exist by virtue of improper training and failing to establish proper rules and procedures regarding the warming of IV solutions

and blood. As a result, based upon their superior knowledge as to the dangers to patients in general, they violated a duty to Levitt, which caused her death. Wilkinson consulted Dr. Larson, an anesthesiologist, before the amended petition was filed. There is no evidence that Wilkinson ever consulted a pathologist prior to filing his amended petition.

The Pathologists argued at the sanctions hearing and in their appellate brief that Wilkinson had no basis in fact or law for filing the initial claim against the Pathologists or that, assuming he did have such a basis in law or fact, he did not produce sufficient evidence to maintain the claims against them. The analysis of the arguments presented by the Pathologists differs from that of the Anesthesiologists in that the expert relied upon by Wilkinson was not himself a specialist in pathology, but anesthesiology. Further, the criticisms of the defendant Pathologists are not based upon actions done in the course of their specialty as pathologists, but as operators of the hospital's blood bank.

The trial court's findings of fact and conclusions of law contain the following statement related to the Pathologist defendants:

> [T]he evidence adduced at the hearing showed that at the close of discovery, not one of Plaintiffs' experts had testified in deposition that the Pathologists acted or failed to act in such a manner that they caused or contributed to the death of Norma Levitt.

This finding was erroneous. Wilkinson's expert witness, Dr. Larson, was deposed on August 14, 1992, at which time he set out his criticism of Drs. Puls and

Hubner, as individuals. We must assume that Dr. Larson's opinions, set out in part below, are the same opinions conveyed to Wilkinson in his pre-filing investigation, and are the opinions that Wilkinson in turn relied upon as the basis for filing his amended petition. In response to questioning, Larson stated:

> Q. Sir, do you have any reason to believe that the death of Norma Levitt was somehow related to a failure on the part of Dr. Puls or Dr. Hubner to maintain properly functioning, reliable blood warmers in the hospital?
>
> A. Yes.
>
> . . . .
>
> Q. The next criticism listed there is a "failure to stop the use of microwave ovens for warming I.V. solutions." Do you have any information that Dr. Hubner and Dr. Puls were in any way aware of this practice?
>
> A. No. They should have been aware of it if it was a hospital policy and it was in the nursing guidelines that this was acceptable practice, and they were responsible for the warming equipment for solutions. They should have been aware that there was another means being used in the hospital besides their equipment for warming any kind of intravenous solution.
>
> Q. Are you under the impression that there was something in the nursing guidelines that would have gone under the nose of Dr. Hubner and Dr. Puls permitting the use of microwave ovens to warm I.V. solutions?

> A. Well, I presume he would see the policies and procedures relating to the warming of solutions since he was responsible for that activity in that hospital. He should have known about it. They should have brought it to his attention.

The defendant Pathologists contend that because Dr. Larson was an anesthesiologist, and not a pathologist, Wilkinson had no reasonable basis to rely on Larson's testimony in support of a claim against the defendant Pathologists. In other words, the Pathologists claim that only a fellow pathologist was qualified to render an opinion against them. Wilkinson's pathology expert, Dr. Zuck, had no criticism of the defendant Pathologists. Therefore, conclude the Pathologists, Larson's testimony was insufficient to form a basis to file or maintain an action against them.

We disagree. Title 12 O.S.1991 § 2702 reads:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise.

While we are familiar with the practice of expert witnesses testifying only against those in a similar specialty, we find there is sufficient basis in the law to hold that such a practice, though common, is not absolutely essential to maintain the viability of a lawsuit. *See Quinton v. Farmland Industries, Inc.*, 928 F.2d 335 (10th Cir. 1991). "The fact that the physician is not a specialist in the

field in which he is giving his opinion affects not the admissibility of his opinion but the weight the jury may place on it." *Payton v. Abbott Labs*, 780 F.2d 147, 155, 156 (1st Cir. 1985); *Sprague v. Bowen*, 812 F.2d 1226 (9th Cir. 1987); *LeMaire ex rel. LeMaire v. United States*, 826 F.2d 949 (10th Cir. 1987); *Heinze v. Heckler*, 581 F.Supp. 13 (E.D.Pa. 1983). We therefore conclude that Wilkinson had a sufficient objective basis in law to rely upon the qualifications of Dr. Larson, anesthesiologist, to render an expert opinion regarding the blood bank at Hillcrest run by the defendant Pathologists. That reliance, though arguably tenuous, was sufficient to support the initial filing of the amended petition.

We therefore hold that the finding set out above in the trial court's order was erroneous. If the award of sanctions against Wilkinson in favor of the Pathologists was grounded solely on a lack of basis to file the claim, we would vacate completely that portion of the order awarding sanctions on that basis. However, there remains the issue of whether Wilkinson had a sufficient basis to continue to hold the defendant Pathologists in the lawsuit.

Well before trial it became objectively apparent that Wilkinson's case against the defendant Pathologists had evaporated. During the deposition of Dr. Larson taken August 14, 1992, Dr. Larson was asked the following question:

> Q. Are you qualified or are you an expert witness in the area of blood banking?
>
> A. No.

Larson went on in his deposition and expressed criticism of Drs. Puls and Hubner for not prohibiting the use of microwave ovens in the warming of IV solutions in their capacity as directors of the Hillcrest blood bank.

Larson admitted again at trial that he did not consider himself an expert witness in the area of blood bank procedures. Dr. Larson admitted that though he knew "a substantial amount about blood banking," he stated "I'm not an expert witness in blood banking."

Moreover, we have reviewed the testimony of Wilkinson's remaining experts and found them to contain no criticism of the defendant Pathologists. Indeed, Dr. Zuck, the plaintiffs' expert on blood banks and blood transfusions, had no criticism of either Drs. Puls or Hubner. Zuck's deposition was taken June 10, 1992, a month before Larson's deposition.

Our analysis of this issue leads to the conclusion that at the sanctions hearing Wilkinson presented sufficient evidence that he conducted an adequate pre-filing investigation. His filing of a claim against the Pathologists was therefore based on an objective, reasonable belief that such a claim was well-grounded in law. There subsequently came a time, however, when Wilkinson should have known that his claim against the Pathologists was destined to fail. We find that time came on August 14, 1992, during the deposition of Dr. Larson. Although he was willing to express criticisms against the Pathologists, it was clear that because of his own admission that he was not an expert in blood bank procedures, Larson would be unqualified to render an expert opinion as to blood bank procedures. With his designated pathology

expert earlier unable to fault the Pathologists, it was clear that Wilkinson would not be able to present sufficient evidence to maintain a viable cause of action against the Pathologists. Yet, Wilkinson went on for months before the defendant Pathologists were finally dismissed from the case at the close of the plaintiffs' case in chief on May 13, 1993. Wilkinson's failure to dismiss the Pathologists when it became clear he had no evidence against them was properly subject to sanctions.

Proceedings to impose sanctions are of equitable cognizance and, while an appellate court will examine and weigh the proof in the record, we will abide by the law's presumption that the decision is legally correct and cannot be disturbed *unless* found to be clearly contrary to the weight of the evidence or to some governing principle of law. If legally correct, the ruling may not be reversed because of the lower court's faulty reasoning, erroneous finding of fact, or its consideration of an immaterial issue. *Matter of Estate of Pope*, 808 P.2d 640, 646 (Okla. 1990).

We have reviewed the findings of fact and conclusions of law which set out the basis of the trial court's award of sanctions in favor of the Pathologists. Except for the one finding discussed above, we find that sufficient evidence supports the remainder of the order and that the decision is legally correct. Wilkinson does not preserve the issue as to the amount of sanctions, or the methodology used by the court in arriving at the figure. Accordingly, we vacate that portion of the order awarding

sanctions to the Anesthesiologists against Bill V. Wilkinson, individually.[11]

V

Conclusion

We affirm the award of sanctions in the amount of $12,500 each to defendants Hillcrest Healthcare Corporation, Hillcrest Medical Center Foundation, Hillcrest Real Estate, Inc., Hillcrest Service Company, Jerry L. Puls, M.D., Douglas Hubner, M.D., Jerry L. Puls, M.D., Inc., and South Utica Pathology Laboratories, Inc. We vacate the award of sanctions to the defendant Drs. Jones, Breipohl, Anthony, Spohr, Singletary, Voss, Wiesemeyer, and Brothers.

AFFIRMED IN PART AND REVERSED IN PART.

RAPP, V.C.J., and STUBBLEFIELD, J., concur.

September 26, 1995

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[11] *See* n.6.

IN THE DISTRICT COURT IN AND
FOR TULSA COUNTY
STATE OF OKLAHOMA

WILLA WARNER, et al., Plaintiffs, vs. **HILLCREST MEDICAL CENTER**, a corporation, et al., Defendants. and **MERLE LEVITT**, et al., Plaintiffs, vs. **HILLCREST MEDICAL CENTER**, a corporation, et al., Defendants.	No. CJ-90-3403 (Consolidated with CJ-91-2677) (Filed Apr. 11, 1994)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to the order of the Court entered on January 18, 1994, this matter came on for hearing at 9:30 a.m. on the 29th day of March, 1994 and continued through March 30, 1994 on the motions of the Defendants Hillcrest Healthcare Corporation, Hillcrest Medical Center Foundation, Hillcrest Service Company, Hillcrest Real Estate, Inc. (hereinafter referred to as Hillcrest Entities), Dr. Gary Breipohl, M.D., Dr. Jonathan Anthony, M.D., Dr. Robert Spohr, M.D., Dr. Thomas Singletary, M.D., Dr. Harold Voss, M.D., Dr. Dan Wiesemeyer, M.D., Dr. Duane

Brothers, M.D., (hereinafter referred to as Anesthesiologists), and Dr. Frederick Jones, M.D., (hereinafter referred to as Jones) and Dr. Douglas Hubner, M.D., Dr. Jerry Puls, M.D., Jerry L. Puls, M.D., Inc., and South Utica Pathology (hereinafter referred to as Pathologists), for sanctions against Bill V. Wilkinson, personally and the law firm of Wilkinson & Monaghan.

The Court, having reviewed the pleadings and briefs filed in said cause, heard the sworn testimony of witness and the arguments of counsel, being fully advised in the premises, does hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT

I.

The above named Defendants were joined as party defendants on or about November 8, 1991, by the filing of an Amended Complaint signed by Mr. Bill V. Wilkinson, individually and on behalf of the law firm of Wilkinson & Monaghan.

II.

During the pretrial proceedings the Hillcrest Entities filed a Motion for Summary Judgment based on the fact they did not control the methods for providing medical services for patients of Hillcrest medical Center, and were not otherwise liable. Mr. Bill V. Wilkinson continually assured the Court there would be evidence of legally responsible control. During pretrial proceedings the Pathologists, Fred Jones and the Anesthesiologists made

numerous oral motions for summary judgment and requests for dismissal on the grounds that there had been no evidence adduced during discovery which would justify the Court submitting these Defendants to the jury.

III.

During the pretrial procedures the Court advised Mr. Bill V. Wilkinson on several occasions, including the pretrial conference, that he should evaluate and reexamine his allegation against the above-named Defendants, that lawsuits are a traumatic experience to all parties and their families, and he should dismiss those against whom he had no viable case to submit to the jury. The Court further advised Mr. Bill V. Wilkinson that his failure to so do might result in sanctions. The Court denied summary judgment to the Hillcrest Entities on the basis of an affidavit from Dianne Miller Hardy whose testimony Mr. Wilkinson assured the Court would make the requisite link between the Hillcrest Entities and the allegations in his Amended Complaint. Mr. Wilkinson never called Dianne Miller Hardy to testify.

IV.

The trial of this case ran from April 20, 1993 until May 18, 1993, a period of twenty-one days, despite assurances it would be two weeks or less.

V.

At the conclusion of the evidence on behalf of the Plaintiff in said cause, the Court sustained demurrers and

dismissed the Hillcrest Entities, the Pathologists, Dr. Fred Jones, and all of the moving Anesthesiologists, with the exception of Dr. Thomas Singletary, M.D. At the conclusion of all the evidence, the Court sustained a Motion for Directed Verdict on behalf of Dr. Thomas Singletary, M.D. and dismissed him from the lawsuit.

VI.

The jury returned a verdict for the four remaining Defendants, Hillcrest Medical Center, Chris Jones, C.R.N.A., Dr. Robert Morton, M.D. and Tulsa Anesthesiologists, Inc. At that time the Court dismissed the companion case (CJ-91-2677) because no viable claims remained.

VII.

Subsequent to the trial of said cause, the Hillcrest Entities, Anesthesiologists, Jones and Pathologists each filed motions for sanctions and costs predicated upon the violation of 12 O.S. 1991 §2011 by Mr. Bill V. Wilkinson and the law firm. Said motions were set for hearing and heard by the Court on March 29 and March 30, 1994.

VIII.

The Hillcrest Entities presented expert testimony that their joinder as party defendants was in violation of 12 O.S. 1991 §2011, as there was no evidence showing that there was a reasonable basis to believe that the allegations made against them were well grounded in fact, or warranted by existing law. Mr. Bill V. Wilkinson and the

law firm failed to produce any evidence that the Hillcrest Entities were involved in providing medical care and treatment to Norma Levitt. The failure of Mr. Bill V. Wilkinson and/or the law firm to dismiss them from the action pursuant to the admonitions and pleading of the trial court amounted to harassment of these entities, caused unnecessary delays in the discovery and trial of said cause, and amounted to a needless and tremendous increase in the cost and time of litigation. The Hillcrest Entities presented expert testimony as to the reasonableness and necessity of the costs incurred by way of attorney fees and other costs, said testimony further established that the attorney fees charged were in conformity with the usual charges in the Tulsa area.

IX.

The Pathologists presented evidence that Mr. Bill V. Wilkinson and the law firm were guilty of violation of 12 O.S. 1991 §2011 as there was no evidence showing that there was a reasonable basis to believe that the allegations made against them were well grounded in fact, or warranted by existing law. Mr. Bill V. Wilkinson testified under oath in response to Pathologists' attorneys that prior to joining them as party defendants he did not contact or consult with any pathologist to ascertain whether the alleged conduct of Pathologists was below the standard of care. Furthermore, the evidence adduced at the hearing showed that at the close of discovery, not one of Plaintiffs' experts had testified in deposition that the Pathologists acted or failed to act in such a manner that they caused or contributed to the death of Norma Levitt. The failure of Mr. Bill V. Wilkinson and/or the law

firm to dismiss the Pathologists from the action, pursuant to the admonition and pleading of the trial judge, amounted to harassment of these doctors, caused unnecessary delays in the discovery and trial of said cause, and amounted to a needless increase in the cost and time of litigation. The Pathologists presented expert testimony as to the reasonableness and necessity of the costs incurred by way of attorney fees and other costs, and said testimony further established that the attorney fees charged were in conformity with the usual charges in the Tulsa area.

X.

The Anesthesiologists presented expert testimony that they had no involvement in the care and treatment of Norma Levitt, and their joinder as party defendants was in violation of 12 O.S. 1991 §2011, and there was no evidence establishing a reasonable basis to believe that the allegations made against them were well grounded in fact, or warranted by existing law. Mr. Bill V. Wilkinson and the law firm failed to produce any evidence that the moving Anesthesiologists were involved in the care and treatment of Norma Levitt. The failure of Mr. Bill V. Wilkinson and/or the law firm to dismiss them from the present action, pursuant to admonition and pleading of the trial court, amounted to harassment of these entities, caused unnecessary delays in the discovery and trial of said cause, and resulted in a needless increase in the cost and time of litigation. The Anesthesiologists presented expert testimony as to the reasonableness and necessity of the costs incurred by way of attorney fees and other related costs, said testimony further established that the

attorney fees charged were in conformity with the usual charges in the Tulsa area.

XI.

Dr. Frederick Jones presented expert testimony that his joinder as a party defendant was in violation of 12 O.S. 1991 §2011, and there was no evidence establishing a reasonable basis to believe that the allegations made against him were well grounded in fact, or warranted by existing law. Mr. Bill V. Wilkinson and the law firm failed to produce any evidence at the trial that Dr. Frederick Jones violated the standard of care in the treatment which he rendered to Norma Levitt. The failure of Mr. Bill V. Wilkinson and the law firm to dismiss Dr. Frederick Jones from the action pursuant to the admonition and pleading of the trial court, amounted to harassment of Dr. Frederick Jones, caused unnecessary delays in discovery and trial of said cause, and amounted to a needless increase in the cost and time of litigation, particularly as to Dr. Frederick Jones. Dr. Frederick Jones further presented expert testimony as to the reasonable necessity of costs incurred by way of attorney fees and other costs. Said testimony further established that the attorney fees charged were in conformity with the usual charges in Tulsa County.

XII.

Mr. Bill V. Wilkinson and the law firm failed to meet their burden of proof in opposing the Defendants' motions for sanctions by wholly failing to reveal what, if any, evidence was accumulated prior to the time that the

Amended Petition was filed or during discovery in respect to the liability for each Hillcrest Entity. Instead, Mr. Bill V. Wilkinson merely attempted to demonstrate that the Court was mistaken on certain evidentiary rulings during the trial, as based on his "interpretation," and that but for those rulings, the "evidence" would have come in. The Court is still left to speculate whether the required "evidence" ever existed and the exact nature of the "evidence". The focus of the authorities and argument of Mr. Bill V. Wilkinson was totally misdirected and nonsensical. Again, the fact that evidentiary rulings were made, even if adverse to his unique understanding of the rules of evidence, does not preclude Mr. Bill V. Wilkinson from now revealing to the Court the precise evidence he accumulated to meet the requirements of 12 O.S. §2011 and to establish liability. Mr. Wilkinson still fails to understand that the separate act of each defendant must be shown to create liability for any of them.

XIII.

The Court finds that neither Mr. Bill V. Wilkinson nor the law firm offered any sworn testimony at the trial in 1993 or at the sanctions hearings on March 29 and March 30, 1994 in opposition to the reasonableness of the attorney fees offered on behalf of the Hillcrest Entities, Pathologists, Anesthesiologists, and Dr. Frederick Jones or on behalf of his cross-claim for sanctions.

CONCLUSIONS OF LAW

Any finding of fact which should be designated as a conclusion of law is hereby denominated as a conclusion of law.

I.

The Court finds that the Hillcrest Entities, Pathologists and Anesthesiologists are the proper parties to seek sanctions. *Sassower v. Field,* 138 F.R.D. 369 (S.D. New York 1991), 12 O.S. 1991 §2017 mirrors Federal Rule 17(a); therefore federal decisions interpreting Rule 17 and the law applicable thereto are persuasive authority under Oklahoma law. *First Life Assurance Company v. Mountain,* 848 P.2d 117 (Okl. App. 1993).

II.

The signature of an attorney of party constitutes a certificate by him that he has read the pleading, motion, or other paper, and that to the best of his knowledge, information, and belief, formed after reasonable inquiry, it is well-grounded in fact and warranted by existing law. The signing of the Amended Petition, Response to Motion for Summary Judgment, and Pre-Trial Order by Mr. Wilkinson in this case constitutes such a certificate.

III.

12 O.S. Section 2011 imposes an affirmative obligation upon litigants to stop and think before initially making legal or factual contentions; Section 2011 also imposes a duty to refrain from continuing to advocate a position

or prosecute a claim which has ceased to have any merit or after it becomes clear the claim has no merit; Section 2011 also mandatorily requires the Court to apply sanctions when warranted.

IV.

To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the Court must, to the extent possible, limit the scope of sanction proceedings to the record. Thus, discovery should be conducted only by leave of the Court, and then only in extraordinary circumstances. Rule 11, *Advisory Committee Notes,* 1983 Amendment. As a matter of law, the discovery conducted by Mr. Wilkinson was appropriate under the circumstances, but the additional discovery requests and pending Motions to Compel and Motion to Inspect would not be in compliance with the Rule, and are overruled.

V.

The failure of Mr. Bill V. Wilkinson and the law firm to conduct a reasonable investigation or to produce any competent evidence which was well grounded in fact or warranted by existing law establishing the liability of the moving Defendants in this case, despite his continually disputed assurance that he would do so, constituted bad faith and oppressive behavior and is sanctionable under 12 O.S. 1991 §2011. *Winters v. City of Oklahoma City,* 740 P.2d 724, 728 n. 22 (Okl. 1987).

VI.

The Court is not at liberty to disregard undisputed evidence and must accept the same as true. The undisputed evidence offered on behalf of the Hillcrest Entities, Jones, Pathologists and Anesthesiologists regarding the violation of 12 O.S. 1991 §2011 and the testimonial evidence regarding the reasonableness of the attorney fees must be accepted as true. *Thomas v. Thomas*, 565 P.2d 722 (Okl. App. 1976).

VII.

The Hillcrest Entities, Jones, Pathologists and Anesthesiologists have met their burden of proof in support of their Motion for Sanctions, and the Court concludes that sanctions in the form of attorney fees and costs should be imposed against Mr. Bill V. Wilkinson personally, and against his interest within the law firm of Wilkinson & Monaghan. *Unit Petroleum Company v. Nuex Corporation*, 807 P.2d 251 (Ok. 1991), and that his counter-claim should be denied.

The combined amount of the sanctions of over $710,000 that was requested is easily justifiable under the extreme and frivolous and malicious circumstances in this case and was reasonably and fairly calculated by all of the defendants. However, the Court must also consider other factors which include deterrence, ability to pay, *history*, bad faith, malice, severity, et cetera, and sanctions should not be used to drive an attorney out of practice or take the place of bar discipline. *White v. General Motors Corporation, Inc.*, 908 F.2d 675 (10th Cir. 1990). Therefore, considering all of the above criteria, the Court finds that

Defendants Hillcrest Health Care Corporation, Hillcrest Medical Center Foundation, Hillcrest Service Company, Hillcrest Real Estate, Inc., Dr. Gary Breipohl, Dr. Jonathan Anthony, Dr. Robert Spohr, Dr. Thomas Singletary, Dr. Harold Voss, Dr. Dan Wiesemeyer, Dr. Duane Brothers, Dr. Frederick Jones, Dr. Douglas Hubner, Dr. Jerry Puls individually, Jerry L. Puls, M.D. Inc., and South Utica Pathology should each be awarded $12,500 of their respective fees and costs as sanctions against Mr. Bill V. Wilkinson and his interest only in the law firm.

Since this Court is not aware of Mr. Wilkinson's net worth and does not desire to cause undue harm to his family or his practice, the Court would consider reducing these amounts if furnished a complete CPA certified accounting of his assets, liabilities, and net worth, if this accounting is furnished within 15 days. If the accounting is not furnished, then execution may issue on the above amounts after 15 days has expired.

/s/ David L. Peterson
DAVID L. PETERSON
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on the 7th day of April , 1994, I mailed a true and correct copy of the above and foregoing to the following with sufficient postage thereon fully prepaid:

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SALLY HOWE-SMITH,
COURT CLERK

/s/ Marianne Moffett
Marianne Moffett,
Deputy Court Clerk

Judge Peterson

IN THE DISTRICT COURT IN AND
FOR TULSA COUNTY
STATE OF OKLAHOMA

MERLE LEVITT, WILLA WARNER and LINDA JONES Plaintiffs, vs. HILLCREST MEDICAL CENTER, et al, Defendants.	)	Case No. CJ-91-2677 (Filed Nov. 5, 1993)

ORDER OF DISMISSAL WITH PREJUDICE

On August 24, 1993, the above styled and entitled matter came on for oral argument in regard to the pending Motions for New Trial/Motion for Judgment N.O.V. The parties appeared through their respective counsel as follows: Bill Sellers and Richard Hardy, attorneys for the Plaintiffs; Mike Hill and Gary Davis, attorneys for Hillcrest Medical Center and related entities; Joseph Best, attorney for Tulsa Anesthesiologists, Inc. and the individual physicians that are members of that group; Mike Atkinson and Ann Allison, attorneys for Fred Jones, M.D.; Steve Rodolf and Karen Callahan, attorneys for South Tulsa Pathology Laboratories, Inc., Douglas Hubner, M.D., and Jerry L. Puls, M.D., Inc.; Tony Jack Lyons, attorney for Jerry Puls, M.D.; John Paul and Nancy Siegel, attorneys for Christine Jones, CRNA.

Prior to commencement of oral arguments, the parties announced they had reached an agreement regarding the resolution of this case, the terms and conditions being announced on the record, all to remain confidential and under seal of the Court.

The Court therefore finds as follows:

1. The terms and conditions of the settlement of this case is in the best interest of the Plaintiffs, is fair and reasonable to Plaintiffs and all Defendants, and the settlement as stated on the record is hereby approved.

2. The Orders of this Court dismissing the Defendants with prejudice shall remain intact, all as appears of record.

3. All claims and liens for attorneys' fees and court costs by attorneys for Plaintiffs, including former attorneys, Bill V. Wilkinson, and Wilkinson & Monaghan, Inc., are hereby satisfied and discharged.

4. The settlement proceeds for all cases are to be paid to the Court Clerk of Tulsa County, who is to place the settlement proceeds on deposit with the county Treasurer in an interest bearing account, under seal, to be distributed upon further Order of this Court.

5. The settlement proceeds, and the terms and conditions of this resolution as approved by the Court, and announced into the record, are to remain confidential.

6. This action is therefore dismissed with prejudice, all parties to pay their own costs and attorneys' fees, except all Motions for Costs

and Sanctions against Bill V. Wilkinson and Wilkinson & Monaghan, Inc., are preserved, to be decided by the Court at a later date.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above findings should be and are hereby made the Order and Judgment of this Court.

Dated this 5th day of November, 1993.

/s/ David L. Peterson
DISTRICT JUDGE

Judge Peterson

IN THE DISTRICT COURT IN AND
FOR TULSA COUNTY
STATE OF OKLAHOMA

WILLA WARNER, LINDA JONES, and MERLE LEVITT, Personal Representatives of the Estate of NORMA LEVITT, Deceased,	)	Case No. CJ-90-3403
Plaintiffs,	)	(Filed Nov. 5, 1993)
vs.	)	
HILLCREST MEDICAL CENTER, et al,	)	
Defendants.	)	

ORDER OF DISMISSAL WITH PREJUDICE

On August 24, 1993, the above styled and entitled matter came on for oral argument in regard to the pending Motions for New Trial/Motion for Judgment N.O.V. The parties appeared through their respective counsel as follows: Bill Sellers and Richard Hardy, attorneys for the Plaintiffs; Mike Hill and Gary Davis, attorneys for Hillcrest Medical Center and related entities; Joseph Best, attorney for Tulsa Anesthesiologists, Inc. and the individual physicians that are members of that group; Mike Atkinson and Ann Allison, attorneys for Fred Jones, M.D.; Steve Rodolf and Karen Callahan, attorneys for South Tulsa Pathology Laboratories, Inc., Douglas Hubner, M.D., and Jerry L. Puls, M.D., Inc.; Tony Jack Lyons, attorney for Jerry Puls, M.D.; John Paul and Nancy Siegel, attorneys for Christine Jones, CRNA.

Prior to commencement of oral arguments, the parties announced they had reached an agreement regarding the resolution of this case, the terms and conditions being announced on the record, all to remain confidential and under seal of the Court.

The Court therefore finds as follows:

1. The terms and conditions of the settlement of this case is in the best interest of the Plaintiffs and the Estate of Norma Levitt, is fair and reasonable to Plaintiffs and all Defendants, and the settlement as stated on the record is hereby approved.

2. The Orders of this Court dismissing certain Defendants at the close of the Plaintiffs' evidence, and the verdict of the jury in favor of the remaining Defendants, Hillcrest Medical Center, Tulsa Anesthesiologists, Inc., Robert Morton, M.D., and Christine Jones, CRNA, shall remain intact, all as appears of record.

3. All claims and liens for attorneys' fees and court costs by attorneys for Plaintiffs, including former attorneys, Bill V. Wilkinson, and Wilkinson & Monaghan, Inc., are hereby satisfied and discharged.

4. The settlement proceeds, and the terms and conditions of this resolution as approved by the Court, and announced into the record, are to remain confidential.

5. This action is therefore dismissed with prejudice, all parties to pay their own costs and attorneys' fees, except all Motions for Costs and Sanctions against Bill V. Wilkinson, and Wilkinson & Monaghan, Inc., are preserved, to be decided by the Court at a later date.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above findings should be and are hereby made the Order and Judgment of this Court.

Dated this 5th day of November, 1993.

/s/ David L. Peterson
DISTRICT JUDGE

IN THE DISTRICT COURT IN AND
FOR TULSA COUNTY
STATE OF OKLAHOMA

MERLE LEVITT, WILLA WARNER and LINDA JONES Plaintiffs, v. HILLCREST MEDICAL CENTER, et al, Defendants.	)	No. CJ-91-2677 (Filed Jan. 14, 1994)

AMENDED ORDER OF DISMISSAL WITH PREJUDICE

On August 24, 1993, the above styled and entitled matter came on for oral argument in regard to the pending Motions for New Trial/Motion for Judgment N.O.V. The parties appeared through their respective counsel as follows: Bills [sic] Sellers and Richard Hardy, attorneys for the Plaintiffs; Mike Hill and Gary Davis, attorneys for Hillcrest Medical Center and related entities; Joseph Best, attorney for Tulsa Anesthesiologists, Inc. and the individual physicians that are members of that group; Mike Atkinson and Ann Allison, attorneys for Fred Jones, M.D.; Steve Rodolf and Karen Callahan, attorneys for South Tulsa Pathology Laboratories, Inc., Douglas Hubner, M.D. and Jerry L. Puls, M.D., Inc.; Tony Jack Lyons, attorney for Jerry Puls, M.D.; John Paul and Nancy Siegel, attorneys for Christine Jones, CRNA.

Prior to the commencement of oral arguments, the parties announced they had reached an agreement

regarding the resolution of this case, the terms and conditions being announced on the record, all to remain confidential and under seal of the Court.

The Court therefore finds as follows:

1. The terms and conditions of the settlement of this case are in the best interest of the Plaintiffs, are fair and reasonable to Plaintiffs and all Defendants, and the settlement as stated on the record is hereby approved.

2. The orders of this Court dismissing the Defendants with prejudice shall remain intact, all as appears of record.

3. The settlement proceeds for all cases are to be paid to the court clerk of Tulsa County, who is to place the settlement proceeds on deposit with the county treasurer in an interest bearing account, under seal, to be distributed upon further order of this Court, after a determination is made as to viability and/or amount of the attorney liens of Bill V. Wilkinson and Wilkinson & Monaghan, Inc.

4. All claims and liens for attorneys' fees and court costs by attorneys for Plaintiffs, including Bill V. Wilkinson, and Wilkinson & Monaghan, Inc. are hereby satisfied and discharged as the same pertain to the settling Defendants.

5. The settlement proceeds, and the terms and conditions of this resolution as approved by the Court, and announced into the record, are to remain confidential.

6. This action is dismissed with prejudice, all parties to pay their own costs and attorneys' fees, except all Motions for Costs and Sanctions against Bill V. Wilkinson, and Wilkinson & Monaghan, Inc., are preserved, to be decided by the Court at a later date.

7. This amended order of dismissal with prejudice is filed to clarify the terms and conditions of the original Order of Dismissal with Prejudice previously filed on the 5th day of November, 1993.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, that the above findings be and are hereby made the order and judgment of this Court.

Dated this ___ day of January, 1994.

DISTRICT JUDGE

STATE OF OKLAHOMA
DISTRICT COURT IN & FOR
TULSA COUNTY, OKLAHOMA

ORDER

On this 24th day of March, 1994, the following matters in the designated cases came on for decisions, pursuant to the Rules of the District Court for Tulsa County. The Clerk of the Court is directed to notify counsel of record of the indicated decisions by mailing a copy of the ORDER to them and filing a copy of the ORDER in each case.

/s/ David L. Peterson
DAVID L. PETERSON
DISTRICT JUDGE

CJ-90-3403 WARNER, ET AL. V HILLCREST, ET AL.
CJ-91-2677 LEVITT, ET AL. V HILLCREST, ET AL.
CJ-93-2879 WILKINSON & MONAGHAN V WILLA WARNER, ET AL.

Law Firm's application to disqualify Judge Peterson from further proceeding in or the adjudication of pending applications for costs, fees and sanctions totaling $710,084.52 is denied. Failure to comply with Rule 15 (a).

IT IS THE COURT'S INTENTION TO CONCLUDE THESE CASES AS COMPLETELY AS POSSIBLE BEGINNING AT 9:30 A.M. ON MARCH 29, 1994 AND CONTINUING FROM DAY TO DAY, IF NECESSARY.

Notice mailed to: Karen Callahan, Bill Wilkinson, Mike Hill, Gary Davis, John

Paul, Mike Atkinson, Bill Sellers, Joe Best, Tony Jack Lyons.

AFFIDAVIT OF MAILING

I hereby certify that I have this 24th day of March, 1994 mailed a true and correct copy of the above decision(s) as ordered by the Court, and a true and correct copy was filed in each of the above foregoing cases.

SALLY HOWE-SMITH,
COURT CLERK

/s/ Marianne Moffett
Marianne Moffett
Deputy Court Clerk

IN THE COURT OF APPEALS, DIVISION 4

STATE OF OKLAHOMA

(Filed Nov. 20, 1995)

THE CLERK IS DIRECTED TO NOTIFY ALL PARTIES OF THE FOLLOWING ORDER(S):

83,555 WILLA WARNER, et al., Plaintiffs, v. HILLCREST MEDICAL CENTER, et al., Defendants, and HILLCREST HEALTHCARE CORPORATION, et al., Appellees, and WILKINSON AND MONAGHAN, et al., Appellants.

Appellants' and Appellees' Petitions for Rehearing are denied.

84,128 THE STATE OF OKLAHOMA, ex rel. ROBERT E. CHRISTIAN, District Attorney of the Sixth Prosecutorial District, Appellee, v. ONE BLACK LEFT-HANDED VEHICLE DOOR, ONE BLACK RIGHT CHEVROLET SUBURBAN DOOR, et al., Appellant.

Appellant's Petition for Rehearing is denied.

84,812 IOOF INCORPORATED, and STATE INSURANCE FUND, Petitioners, v. CLYDE W. WIMSETT and THE WORKERS' COMPENSATION COURT, Respondents.

Petitioners' Petition for Rehearing is denied.

Respondents' Motion for Costs and Attorney Fees is denied.

Done in conference this 16th day of November, 1995.

/s/ Jerry L. Goodman
JERRY L. GOODMAN
Presiding Judge
Court of Appeals, Division 4

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

WILLA WARNER et al., Plaintiffs, v. HILLCREST MEDICAL CENTER et al., Defendants, and HILLCREST HEALTHCARE CORP. et al., Appellees, v. WILKINSON and MONAGHAN, and BILL V. WILKINSON, Appellants.	)	No. 83,555 (Filed Apr. 1, 1996)

ORDER

Appellants' Petition to Review Order Denying Disqualification is entertained. The Court of Appeals' Order Denying Motion to Disqualify is left undisturbed. The Statement of Amicus Curiae is accepted as filed on December 8, 1995. The Petition for Certiorari filed by the appellants and the Petition for Certiorari filed by the anesthesiology appellees are both denied.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 1st DAY OF APRIL, 1996.

/s/ Alma Wilson
CHIEF JUSTICE

Concur: HODGES, HARGRAVE, OPALA, SUMMERS, JJ., and Judge Rita Strubhar, Special Justice, sitting by designation for Kauger, V.C.J., who recused.

Dissent: WILSON, C.J., LAVENDER, SIMMS, WATT, JJ.

Supreme Court, U.S.
FILED
JUL 30 1996
CLERK

No. 96-6

In The

Supreme Court of the United States

October Term, 1995

WILKINSON AND MONAGHAN, a Professional Corporation, and BILL V. WILKINSON,

Petitioners,

vs.

HILLCREST HEALTHCARE CORPORATION, HILLCREST MEDICAL CENTER FOUNDATION, HILLCREST REAL ESTATE, INC., HILLCREST SERVICE COMPANY, JERRY PULS, M.D., DOUGLAS HUBNER, M.D., JERRY L. PULS, M.D., INC., AND SOUTH UTICA PATHOLOGY LABORATORIES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals For The State Of Oklahoma Divison IV

BRIEF IN OPPOSITION OF RESPONDENTS HILLCREST HEALTHCARE CORPORATION, HILLCREST MEDICAL CENTER FOUNDATION, HILLCREST REAL ESTATE, INC., AND HILLCREST SERVICE COMPANY

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QUESTION PRESENTED

Whether it is a violation of due process for a judge who has presided over ongoing litigation subsequently to rule upon an Application for Sanctions based upon conduct of an attorney occurring during the course of that litigation?

LIST OF PARTIES

Petitioners, Bill V. Wilkinson and Wilkinson & Monaghan, Inc., Petitioners herein, provided representation for Willa Warner, Linda Jones and Merle Levitt, Personal Representatives of the Estate of Norma Levitt, Deceased (who are not parties to this proceeding) in initiating litigation from which this proceeding derives.

Respondents Hillcrest Healthcare Corporation, Hillcrest Medical Center Foundation, Hillcrest Real Estate, Inc., Hillcrest Service Company, Jerry Puls, M.D., Douglas Hubner, M.D., Jerry L. Puls, M.D., Inc. and South Utica Pathology Laboratories, Inc., were all Defendants in that original litigation which also included other entities which are not parties to this proceeding, including Hillcrest Medical Center, Robert Morton, M.D., Christine Jones, CRNA, Tulsa Anesthesiologists, Inc., Frederick Jones, M.D., Gary Breipohl, M.D., Jonathan Anthony, M.D., Robert Spohr, M.D., Thomas Singletary, M.D., Harold Voss, M.D., Don Wiesemeyer, M.D., and Duane Brothers, M.D. Pursuant to Supreme Court Rule 29.6, Respondents state that they are Oklahoma corporations; Hillcrest Healthcare Corporation is the parent corporation of which Hillcrest Medical Center Foundation, Hillcrest Real Estate, Inc., Hillcrest Service Company and Hillcrest Medical Center are subsidiaries.

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I. STATEMENT OF THE CASE

On November 9, 1989, Norma Levitt underwent hip replacement surgery at Hillcrest Medical Center in Tulsa, Oklahoma. Near the end of the surgery, a Certified Registered Nurse Anesthetist, who was not an employee of the hospital, ordered a unit of blood for the patient, and also directed that it be warmed in a microwave oven. The nurse anesthetist was an employee of Tulsa Anesthesiologists, a professional corporation providing the anesthesia services for the surgery. The blood was warmed as directed, and the transfusion began.

Approximately fifteen minutes after the blood was hung, an x-ray was taken and the patient was rolled from her side to her back. At this time, the patient showed signs of breathing problems and oxygen loss, which preceded the stopping of her heartbeat. A code blue was sounded, but the patient could not be revived.

Within six months of these events, Bill Wilkinson, of the firm Wilkinson and Monaghan (hereinafter "Wilkinson") commenced an action as attorney for the estate of the patient, naming only the hospital as defendant. One action was commenced in the District Court of Creek County, State of Oklahoma, which was later transferred to Tulsa County; a second action was commenced in the United States District Court for the Northern District of Oklahoma, which was later voluntarily dismissed. For a year and a half, the hospital was the sole defendant, during which time a considerable record was generated by Wilkinson.

The action commenced in Creek County and transferred to Tulsa County asserted claims on behalf of the estate sounding in tort and contract. Following transfer, Wilkinson filed an Amended Petition purportedly asserting claims on behalf of the individual survivors in their individual capacities. These individual claims (as distinct from those of the estate) were dismissed, at which time Wilkinson filed a separate action reasserting the claims of the individual Plaintiffs. This separate litigation also generated a considerable record.

On November 8, 1991, Wilkinson filed Amended Petitions in both actions, joining an additional twenty Defendants, including the Respondents herein Hillcrest Healthcare Corporation, Hillcrest Medical Center Foundation, Hillcrest Real Estate, Inc., and Hillcrest Service Company (hereinafter "Hillcrest Respondents"), each a distinct corporate entity. Wilkinson admitted to the trial court that these Defendants were named intentionally and purposefully.

The Hillcrest Respondents sought dismissal as improper parties. The trial court declined to dismiss them, but admonished Wilkinson against suing parties with no real basis.

The two underlying actions were consolidated, and the Hillcrest Respondents sought summary judgment and sanctions on the grounds that the hospital alone was involved in the provision of medical services to Norma Levitt; that none of the Hillcrest Respondents were direct providers of medical services, and that none provided services or maintained records regarding Norma Levitt.

At a hearing on the Hillcrest Respondents' motion the trial judge specifically inquired whether Wilkinson had a reasonable basis for keeping the Hillcrest Respondents as Defendants in this action, and warned of possible sanctions should Wilkinson fail to present a case against them at trial. With that admonition, the court overruled the Motion for Summary Judgment. At this time, the Hillcrest Respondents had been parties to both actions for well over a year.

Subsequently, when the Pre-Trial Order was considered by the District Court, Wilkinson was reminded that he needed to evaluate his case as to all Defendants, and was again warned of the possibility for sanctions for suing unnecessary parties.

Wilkinson went to trial against twenty Defendants, presenting his opening statement on April 23, 1993. Three weeks and 4,000 transcript pages later, Wilkinson rested his case.

Wilkinson tried his case on the theory that warming the blood in the microwave oven destroyed the red blood cells, releasing potassium into the blood by the transfusion. However, the maximum recorded potassium level was not toxic. Moreover, the patient's problems did not follow immediately upon commencement of the transfusion, but only after she had been rolled on her back, possibly releasing fatty emboli into her blood stream, clogging her lungs.

The demurrers of fifteen Defendants, including the Hillcrest Respondents, were sustained. The remaining Defendants presented their defense in a single day. The

jury returned a verdict in favor of all remaining Defendants, including the nurse anesthetist, indicating its finding that warming the blood in the microwave oven did not cause the death. The companion case, on behalf of the individual survivors, was then dismissed.

Wilkinson moved for new trial, but was fired by his former clients. New counsel filed an Amended Motion for New Trial, and argued, among other issues, misconduct by Wilkinson. With new counsel, it was possible to settle the underlying claim, and the court did not rule upon the pending Motions for New Trial. No appeal was taken.

The Hillcrest Respondents filed their Motion for Sanctions on June 29, 1993. The hospital at which the underlying events occurred, Hillcrest Medical Center, did not seek sanctions. At the hearing on the Motion for Sanctions, the Trial Court heard the testimony of both attorneys representing the Hillcrest Respondents, along with the attorney for a co-defendant, who offered testimony based upon his actual experience as a participant in the litigation, and who also appeared as an expert witness on behalf of the Hillcrest Respondents. The court held that Wilkinson violated 12 O.S. 1991 § 2011, the state analog to Fed.R.Civ.P. 11, by "signing of the Amended Petition, Response to Motion for Summary Judgment, and Pre-Trial Order . . . " Pet. App. at 40a, Conclusion II. The trial court held that Wilkinson's conduct "constituted bad faith and oppressive behavior and is sanctionable. . . . " Pet. App. at 41a, Conclusion V. Accordingly, the court imposed sanctions upon Wilkinson, awarding each of the Hillcrest Respondents $12,500.00. Pet. App. at 42a-43a, Conclusion VII.

Wilkinson appealed the sanctions, which was assigned by the Oklahoma Supreme Court to Division IV of the Oklahoma Court of Appeals for consideration. The Court of Appeals made an "objective determination" of whether Wilkinson had a "reasonable basis" to commence or prosecute a claim against each of the multiple defendants, as the law requires:

> Our concern is whether the attorney had a reasonable, objectively ascertainable basis to file and maintain the allegations made against the defendants. If at any point in this inquiry we find either that Wilkinson had no reasonable basis in fact or law to initially file the claim, or that after filing the claim he could not produce evidence which would reasonably support the continuation of the claim, we will not hesitate to affirm the trial court's imposition of proper sanctions. However, we will not uphold sanctions for ineffective or even poor presentation of an otherwise viable claim.

Pet. App. at 11a-12a. The Court of Appeals affirmed sanctions in favor of the Hillcrest Respondents, and certain other Defendants (co-respondents herein), but reversed the award in favor of the remaining Defendants. Pet. App. at 31a.

Wilkinson did not argue to the appellate courts of Oklahoma that his right to "due process" was violated by the refusal of the trial judge to recuse himself upon request. Among the sub-propositions argued in his appeal was the contention that "the trial court applied the wrong legal standard." *See* Wilkinson's Brief in Chief filed December 23, 1994 at pp. 24-28. In the course of this argument, Wilkinson suggested a lack of impartiality on

the part of the trial judge, to support his contention of legal error in the decision reached:

> At this juncture, one must question whether the adoption of the wrong standard and the tenor of the trial court's remarks, were a manifestation of an over-zealous judge or a judge that was not impartial.

Wilkinson's Brief in Chief at p. 25. The Oklahoma Court of Appeals, Division IV, did not address the trial judge's decision not to recuse, or any "due process" issues involved therein, in its Opinion filed September 25, 1995. Pet. App. at 1a-31a.

Moreover, Wilkinson did not address the trial judge's decision not to recuse in his Petition for Rehearing filed with the Oklahoma Court of Appeals (Wilkinson did seek to disqualify one appellate judge, and even the entire appellate panel). Likewise Wilkinson did not mention that he requested the trial judge to recuse, or raise any error regarding his failure to do so, in his Petition for Writ of Certiorari filed with the Oklahoma Supreme Court.

II. REASONS FOR DENYING A WRIT

A. WILKINSON'S ISSUE WAS NOT "PRESSED OR PASSED UPON" IN STATE COURT.

This Court should deny Wilkinson's Petition for Writ of Certiorari because the issue which he proposes to present to this Court was not "pressed or passed upon" in the appellate courts of the State of Oklahoma.

Regardless of whether the principle is jurisdictional or prudential, the practice of this Court has been to deny a Petition for Writ of Certiorari where the substantive constitutional claims were not first passed upon by the state appellate courts. In *Yee v. City of Escondido*, 503 U.S. 519 (1992), this Court declined to address a substantive due process issue because it "was not raised or addressed below . . . " *Id.* at 532-533.

> The Yees did not include a due process claim in their complaint, nor did petitioners raise a due process claim in the Court of Appeal. It was not until their petition for review in the California Supreme Court that petitioners finally raised a substantive due process claim. But the California Supreme Court denied discretionary review. Such a denial, as in this Court, expresses no view as to the merits. (citations omitted) In short, petitioners did not raise a substantive due process claim in the state courts and no state court has addressed such a claim.
>
> . . . While we have expressed inconsistent views as to whether this rule is jurisdictional or prudential in cases arising from state courts (citation omitted), we need not resolve the question here. . . . Even if the rule were prudential, we would adhere to it in this case. Because petitioners did not raise their substantive due process claim below, and because the state courts did not address it, we will not consider it here.

503 U.S. at 533. This Court has addressed "the policies that animate the 'not pressed or passed upon below' rule":

> These policies are first, comity to the States, and second, a constellation of practical considerations, chief among which is our own need for a properly developed record on appeal. (citation omitted)

Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 79 (1988). In *Crenshaw*, this Court declined to address several constitutional challenges to an award of punitive damages on the grounds that the issues had not been explicitly and squarely presented to the state courts for resolution:

> [A]ppellant's petition for rehearing [to the Mississippi Supreme Court] alleged only that the punitive damages award "was clearly excessive, not reasonably related to any legitimate purpose, constitutes excessive fine, and violates constitutional principles." . . . The vague appeal to constitutional principles does not preserve appellant's Contract Clause or due process claims. A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon (citation omitted).
>
> Appellant's reference to the excessiveness of the punitive damages award more colorably raises a cognizable constitutional challenge to the size of the award, one based upon the Excessive Fines Clause of the Eighth Amendment. But this language as well is too oblique to allow us to conclude that appellant raised before the Mississippi Supreme Court the federal claim it now urges us to resolve. . . . Although the petition for rehearing alleges that the fine is excessive, it does not indicate that the fine is excessive as a

> constitutional matter, be it state or federal. It certainly does not identify the Excessive Fines Clause of the Eighth Amendment to the Federal Constitution as the source of appellant's claim. Indeed, the crucial language from appellant's petition contains no reference whatsoever to the Eighth Amendment, the Federal Constitution or federal law. This failure to invoke the Federal Constitution is especially problematic in this case, because the Mississippi Constitution contains it owns Excessive Fines Clause (citation omitted). Thus, even if the Mississippi Supreme Court understood appellant to be offering a constitutional challenge, it may very well have taken that challenge to be anchored in the State Constitution. (citation omitted) . . . We therefore concluded that appellant's Eighth Amendment challenge, like its other challenges to the size of the punitive damages award, was not properly raised below.

486 U.S. at 77-78. In so holding, this Court cited *Taylor v. Illinois*, 484 U.S. 400, 407 n. 9 (1988) ("A generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights . . . "), and *Webb v. Webb*, 451 U.S. 493, 501 (1981) ("At the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law") (emphasis original).

In *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), this Court declined to consider a

constitutional challenge because "TXO did not squarely argue in the West Virginia Supreme Court of Appeals that these aspects of the jury instruction violated the Due Process Clause. . . . " *Id.* at 464.

Under these precedents, this Court should decline to consider an issue which was not "squarely presented" to the appellate courts of Oklahoma, and which was not "pressed or passed upon below".

Wilkinson presents a single question in his Petition for Writ of Certiorari:

> Whether an attorney, against whom sanctions have been imposed in a civil case, has been denied the constitutional requirement of a neutral adjudicator when the Judge imposing the sanctions had previously determined essential issues of law directly related to the sanctions hearing.

Pet. Cert. at i. This Court should decline the Petition for Writ of Certiorari because this issue was not "squarely presented" to the appellate courts of Oklahoma.

Appeals from the District Courts of Oklahoma are commenced by filing a Petition in Error with the Oklahoma Supreme Court; all appeals then become subject to assignment by the Oklahoma Supreme Court to the Court of Appeals for consideration. Rules 1.14(a), 1.16(F), Rules of Appellate Procedure in Civil Cases, 12 O.S. Supp. 1995, Ch. 15, App. 2. After rendition of an Opinion by the Court of Appeals, an aggrieved party may then petition the Oklahoma Supreme Court for further review by Writ of Certiorari. Rule 3.13, Rules on Practice and Procedure

in the Court of Appeals and on Certiorari to that Court, 12 O.S. 1991, Ch. 15, App. 3.

Wilkinson commenced his Appeal from the order imposing sanctions by filing his Petition in Error with the Oklahoma Supreme Court on May 11, 1994. Wilkinson listed fifty-three "Issues and Error proposed to be Raised on Appeal" set forth on eight pages attached to his Petition in Error. Wilkinson's first issue was:

> The Trial Judge committed error by failing or refusing to do the following:
>
> 1. To recuse or disqualify as the Judge in determining the Application for Sanctions and for Costs and Fees considering the nature and background of the case.

So framed, the issue does not squarely raise a constitutional challenge under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Significantly, on page six of his Petition in Error, Wilkinson did not mark "constitutional law" as one of "the applicable issues involved in this appeal". See, Form of Petition in Error, Rule 1.16(C), Oklahoma Rules of Civil Appellate Procedure.

Wilkinson filed his Brief in Chief in his state appeal on December 23, 1994, and identified only a single proposition as addressed in his Brief: "THE SANCTIONS THAT WERE LEVIED BY THE TRIAL COURT RESULTED FROM AN ABUSE OF DISCRETION AND WERE CLEARLY ERRONEOUS." Wilkinson argued several subpropositions, none of which squarely raised a constitutional "due process" challenge to the circumstance that the same judge who presided over the trial also presided

over the hearing on sanctions. In sub-proposition H, ("THE TRIAL COURT APPLIED THE WRONG LEGAL STANDARD"), Wilkinson argued that the trial judge misunderstood the applicable law and made an erroneous decision. Wilkinson argued a lack of impartiality on the part of the trial judge and "animosity toward Mr. Wilkinson", but only to suggest that the wrong standard had been applied. Wilkinson's Brief in Chief at pp. 25-26. To the contrary, the Hillcrest Respondents submit that the trial judge exhibited consummate skill and patience throughout the course of the underlying litigation. Nevertheless, the record shows that Wilkinson did not "press" a constitutional challenge in his appeal to the Oklahoma appellate courts. Wilkinson did not even argue that the trial judge erred by declining to recuse himself. As a matter of Oklahoma law, an issue raised in the Petition in Error which is not argued in the Brief is considered abandoned. *Perry v. Meek*, 618 P.2d 934, 938 (Okla. 1980). Accordingly, Wilkinson abandoned the trial judge's refusal to recuse as a proposition to be considered in his appeal.

The appeal was assigned to Division IV of the Oklahoma Court of Appeals, which, on September 5, 1995, issued its Opinion. That opinion was subsequently withdrawn, and a new Opinion filed September 26, 1995. The court noted that of the fifty-three propositions listed in the Petition in Error, only one, (whether or not the sanctions levied were an abuse of the trial court's discretion) was preserved in the Brief. Pet. App. at 6a. In fact, nowhere in the Opinion did that court suggest a challenge to the trial judge's impartiality, and certainly not

one based upon the constitutional guarantee of "due process".

On October 16, 1995, Wilkinson filed a Petition for Rehearing with the Oklahoma Court of Appeals, but did not at any point argue error based on the trial judge's refusal to recuse himself. Wilkinson did challenge the appellate judge who authored the Opinion, and the entire appellate panel, but relied exclusively upon state law. Wilkinson does not include that issue in his Petition for Writ of Certiorari filed with this Court.

The Oklahoma Court of Appeals denied Wilkinson's Petition for Rehearing by an Order filed November 20, 1995. Wilkinson then petitioned the Oklahoma Supreme Court for further review by Writ of Certiorari on December 8, 1995. Wilkinson did not argue that the Due Process Clause of the Fourteenth Amendment to the United States Constitution was violated by the trial judge's refusal to recuse himself. Wilkinson did continue his challenge to the appellate panel. The Oklahoma Supreme Court denied Wilkinson's Petition for Writ of Certiorari on April 1, 1996, and mandate issued April 11, 1996. Pursuant to Rule 3.17, Rules of the Oklahoma Court of Appeals and on Certiorari to the Court: "If writ of certiorari is denied, no petition for rehearing may be filed in the Supreme Court".

In summary, Wilkinson is petitioning for certiorari in order to have this Court address an issue which was not presented to the appellate courts of the State of Oklahoma for consideration. The issue was neither pressed nor passed upon in the state courts. As that is the only issue presented by Wilkinson in his Petition for Writ of

Certiorari, it follows that his Petition should be denied. There is no issue which this Court should review in this matter.

B. WILKINSON RECEIVED DUE PROCESS.

This Court should deny Wilkinson's Petition for Writ of Certiorari; his right to due process as guaranteed by Fourteenth Amendment to the United States Constitution was not transgressed during the trial court proceedings leading to the imposition of sanctions. At no time, did Wilkinson present to an Oklahoma appellate court a due process challenge to the imposition of sanctions. Sanctions were not based exclusively upon the evidence, or lack thereof, at the trial of the underlying action. Instead, a separate two-day hearing was held, at which time Wilkinson could have shown the court the evidence he had. See, Pet. App. at 38a-39a, Finding XII.

Wilkinson's argument is based upon the "due process" requirement of the Fourteenth Amendment to the United States Constitution. Pet. Cert. at 2. Federal statutes such as 28 U.S.C. §§ 114, 445, or case law interpreting those statutes, have no application to the requirements for disqualification of a state court judge. That issue is a matter of state law. This Court has held: "[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level." *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 702 (1948), as quoted in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 820 (1986). "The Due Process Clause demarks only the outer boundaries of judicial disqualification." *Aetna v. Lavoie*, 475 U.S. at 828.

> Moreover, the traditional common-law rule was that disqualification for bias or prejudice was not permitted. (citations omitted) . . . The more recent trend has been towards the adoption of statutes that permit disqualifications for bias or prejudice. (citations omitted) But that alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause.

Id. at 820. "[M]ore than mere allegations of bias and prejudice" were required for a Due Process violation; in that case it was shown that the judge had a "more direct stake in the outcome of th[e] case". *Id.* at 821. A judge must have "an interest in the outcome of th[e] case" to require recusal. *Id.* at 822. That interest must be "direct, personal, substantial [and] pecuniary." *Id.* at 822, 824, 826 (citation omitted). Wilkinson suggests no such interest, and his Petition for Certiorari should be denied.

The trial judge of whom Wilkinson now complains fully performed his function as an impartial adjudicator of issues presented him by opposing litigants. It was the Hillcrest Respondents who initially raised the question of their proper joinder as parties by seeking dismissal. It was the Hillcrest Respondents who sought summary judgment on the grounds that they did not perform services in connection with the surgery upon which the underlying action was based. The trial judge actually ruled favorably to Wilkinson on these matters. The trial judge allowed Wilkinson to proceed with this action, while admonishing him of the necessity to present viable claims against all defendants at trial.

Wilkinson's counsel of record relies upon a law journal article that he authored in which appears the following:

> The Supreme Court has never held that prior exposure to facts or prior adherence to a legal position violates due process.

Redish & Marshal, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455, 502 (1986). The mere circumstance that the trial judge had been previously exposed to many of the issues in the four-week long trial does not preclude him from also presiding over the hearing during which the Hillcrest Respondents, and other parties, sought sanctions against Wilkinson. At common law, "a judge was disqualified for direct pecuniary interest and for nothing else." Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 609 (1947).

Wilkinson relies primarily on, *In Re: Murchison*, 349 U.S. 133 (1955), in which, the judge in question had previously conducted a secret "judge-grand jury" proceeding.

> Michigan law authorizes any judge of its courts of record to act as a so-called "one-man grand jury". He can compel witnesses to appear before him in secret to testify about suspected crimes. We have previously held that such a Michigan "judge-grand jury" cannot consistently with the Due Process Clause of the Fourteenth Amendment summarily convict a witness of contempt for conduct in the secret hearings. . . .
>
> The petitioners, Murchison and White, were called as witnesses before a "one-man judge-grand jury". Murchison, a Detroit policeman,

> was interrogated at length in the judge's secret hearings where questions were asked him about suspected gambling in Detroit and bribery of policemen. His answers left the judge persuaded that he had committed perjury, particularly in view of other evidence before the "judge-grand jury". The judge then charged Murchison with perjury and ordered him to appear and show cause why he should not be punished for criminal contempt. White, the other Petitioner, was also summoned to appear as a witness in the same "one-man grand jury" hearing. Asked numerous questions about gambling and bribery, he refused to answer on the ground that he was entitled under Michigan law to have counsel present with him. The "judge-grand jury" charged White with contempt and ordered him to appear and show cause. The judge who had been the "grand jury" then tried both Petitioners in open Court, convicted and sentenced them for contempt.

349 U.S. at 133-135. This Court observed that "a 'judge-grand jury' is even more a part of the accusatory process than an ordinary lay grand juror" and that "apparently the trial judge here did consider himself a part of the prosecution". *Id.* at 137 & n. 8. Thus, in *Murchison* a judge who actively *prosecuted* the defendants in *secret* proceedings, then convicted them based upon their actions in the secret proceedings. Nothing analogous to that situation occurred in the underlying case.

Moreover, the trial judge here did not impose sanctions based upon events occurring in "secret proceedings". The underlying trial was held in open court. Wilkinson was later afforded a separate two-day hearing

in a trial format. The Hillcrest Respondents, and other defendants also seeking sanctions, presented witnesses and other evidence in their behalf in support of their claim for sanctions; Wilkinson in turn was afforded the opportunity to call witnesses and introduce evidence to oppose the imposition of sanctions. Based upon the evidence at that hearing, the trial court imposed sanctions. No violation of Wilkinson's "due process" rights occurred during that process.

Wilkinson also relies upon *Tumey v. State of Ohio*, 273 U.S. 510 (1927), in which a town mayor was authorized by statute to impose fines on certain offenders. Tumey was arrested for unlawfully possessing intoxicating liquor, and was fined by the mayor. This Court found a due process violation because the mayor would have a direct personal interest in the payment of fees, and therefore in the imposition of the punishment.

> The fees which the mayor and marshall received in this case came to them by virtue of the general statutes of the state applying to all state cases, liquor and otherwise. The mayor was entitled to hold the legal fees taxed in his favor (citation omitted) . . . but no fees or costs in such cases are paid him except by the defendant, if convicted. There is, therefore, no way by which the mayor may be paid for his service as judge, if he does not convict those who are brought before him; nor is there any fund from which marshals, inspectors and detectives can be paid for their services in arresting and bringing to trial and furnishing the evidence to convict in such cases, except it be from the initial $500 which the village may vote from its treasury to set the court going or from a fund created by the

> fines thereafter collected from convicted defendants.

273 U.S. at 520. This Court found such a direct financial interest to be in violation of the defendant's due process rights:

> All questions of judicial qualification may not involve constitutional validity. Thus, matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters of legislative discretion (citation omitted). But it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.

273 U.S. at 523. Nothing similar to that personal financial interest exists in the instant case.

Additionally, in both *Murchison* and *Tumey*, the parties had raised "due process" challenges in the state court systems:

> Petitioners objected to being tried for contempt by this particular Judge for a number of reasons including . . . trial before the judge who was at the time the complainant, indicter and prosecutor, prosecuted a denial of the fair and impartial trial required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

349 U.S. at 135.

> Tumey . . . moved for his dismissal because of the disqualification of the mayor to try him under the Fourteenth Amendment.

273 U.S. at 515. However, in the instant case, Wilkinson did not raise his "due process" challenge in the courts of the State of Oklahoma. He may not raise them now in this Court.

In summary, Wilkinson's reliance upon *Murchison*, 349 U.S. 133, and *Tumey v. Ohio*, 273 U.S. 510, is misplaced. Nothing analogous to the situation in those cases was presented in the process by which sanctions were imposed upon Wilkinson. Wilkinson was afforded a separate hearing at which he had the opportunity to present witnesses and other evidence in his behalf. The trial judge had no direct, personal interest in the imposition of sanctions. No "due process" violation may be predicated on these circumstances.

C. THE OKLAHOMA COURT OF APPEALS DID NOT ERR REGARDING THE TRIAL COURT'S EVIDENTIARY RULINGS.

The Oklahoma Court of Appeals did not err in its discussion of trial court evidence presented by Wilkinson regarding possible liability of the Hillcrest Respondents. At first glance, it is unclear how this issue is relevant to whether this Court should grant certiorari to review the imposition of sanctions. Nevertheless, the Oklahoma Court of Appeals was correct and Wilkinson failed to present any evidence at trial which would support liability of the Hillcrest Respondents. At the sanctions hearing, Wilkinson failed to show the court what evidence he

had to support claims against the Hillcrest Respondents. Pet. App. at 38a-39a, Finding XII.

Wilkinson appears to argue that "the refusal by the Oklahoma Court of Appeals to review the trial court's evidentiary rulings on the ground that 'that allegation of trial error has been waived', APP. 15a, does not constitute such an independent and adequate state ground [as would preclude a review of a refusal to adjudicate an issue of federal law]". Pet. Cert. at 21. On the one hand, there was no "state court's refusal to adjudicate an issue of federal law" for the simple reason that no issue of federal law was ever presented to the Oklahoma Court of Appeals for review. See, Pet. Cert. at 21. Specifically, Wilkinson did not raise his "due process" challenge in the Oklahoma courts. On the other hand, the action of which Wilkinson complains is fully in accord with the law of the State of Oklahoma and there is no federal issue implicated which would warrant review by this Court.

It is necessary to distinguish the four-week long trial during which Wilkinson attempted to present a case against twenty separate defendants, occurring in the spring of 1993, and the two-day hearing on sanctions occurring in March, 1994. The evidentiary rulings of which Wilkinson complains occurred during the trial, not during the sanctions hearing. Following his defeat at trial, Wilkinson was fired by his former clients, who obtained new counsel. With new counsel, the underlying claim was settled, and no ruling was ever made by the Trial Court on the pending Motion for New Trial, nor was any appeal ever taken from the Trial Court judgment. Accordingly, evidentiary rulings at trial were beyond appellate review.

Prior to trial, Wilkinson had been admonished by the trial judge that he would need to present sufficient evidence to make a prima facie case against each of the multiple Defendants who had been sued. At the time, Wilkinson relied upon an affidavit from a specific individual, Diane Miller-Hardy, and assured the trial judge that, at trial, this witness would offer testimony to support a claim against the Hillcrest Respondents. Nevertheless, at trial, Wilkinson did not call that individual as a witness. Only one witness offered any testimony which mentioned the Hillcrest Respondents: Lonnie Wright, a hospital consultant from Scottsdale, Arizona. The majority of his testimony addressed hospital accreditation and the adoption of standards, which would relate exclusively to the hospital, and not to the separate corporate entities, the Hillcrest Respondents. Trial Transcript, Vol. XIII, pp. 2966-3028. This witness was not identified in the Pre-Trial Order as offering testimony as to the relationship between the hospital and the Hillcrest Respondents. Record at 6518, Pre-Trial Order, p. 82. In his deposition, this witness had stated that he had no opinions on the subject. Nevertheless, the trial judge allowed this witness to testify over objection, a ruling which would be to Wilkinson's benefit. Record at 10,067 Trial Transcript, Vol. XIII, pp. 3029-30. Wilkinson showed this witness two documents, a directory from the board of trustees for Hillcrest Medical Center and Hillcrest Healthcare Corporation and a directory for Hillcrest Medical Center Foundation, Inc. These documents were neither offered nor admitted into evidence. Based upon these documents, the witness observed a "commonality" between the executive committee and officers of the corporations, and stated

that this is a "customary practice" among hospitals in general. However, the witness offered no testimony about the actual relations among the hospital and the Hillcrest Respondents.

When objections to some of Wilkinson's questions were sustained, Wilkinson did not make an offer of proof. Without an offer of proof, Wilkinson had no error to raise on appeal; without an error to raise on appeal, Wilkinson could not contend that the dismissal of the Hillcrest Respondents was improper. See, *Braden v. Hendricks*, 695 P.2d 1343, 1349 (Okla. 1985); *Haskins v. Felder*, 270 P.2d 960, 963 (Okla. 1954); *Oklahoma Tax Commission v. Price*, 197 Okla. 1, 167 P.2d 873, 876 (1946).

Following Wilkinson's defeat at trial, the Hillcrest Respondents (but not the hospital) moved for sanctions, on which a hearing was held March 29 and 30, 1994. At that time, Wilkinson had the opportunity to present to the trial court his evidence in support of a claim against the Hillcrest Respondents. Wilkinson did not offer any such evidence during the hearing on sanctions.

> Mr. Bill V. Wilkinson and the law firm failed to meet their burden of proof in opposing the Defendant's motions for sanctions by wholly failing to reveal what, if any, evidence was accumulated prior to the time that the Amended Petition was filed or during discovery in respect to the liability for each Hillcrest Entity. Instead, Mr. Bill V. Wilkinson merely attempted to demonstrate that the Court was mistaken on certain evidentiary rulings during the trial, as based on his "interpretation" and that but for these rulings, the "evidence" would have come in. The Court is still left to speculate whether the

> required "evidence" ever existed and the exact nature of the evidence. The focus of the authorities and argument of Mr. Bill V. Wilkinson was totally misdirected and nonsensical. Again, the fact that evidentiary rulings were made, even if adverse to his unique understanding of the Rules of Evidence, does not preclude Mr. Bill V. Wilkinson from now revealing to the Court the precise evidence he accumulated to meet the requirements of 12 O.S. § 2011 and to establish liability. Mr. Wilkinson still fails to understand that the separate act of each Defendant must be shown to create liability for any of them.

Pet. App. at 38a-39a, Finding XII. The trial judge did not rely merely upon the absence of evidence at trial to impose sanctions upon Wilkinson. Instead Wilkinson was provided the opportunity to come forth with the evidence he thought should have been admitted, in order to demonstrate that he had a viable case against the Hillcrest Respondents. Wilkinson failed to do this, and the sanctions were properly imposed by the trial court.

On appeal, the Oklahoma Court of Appeals reviewed the evidence presented by Wilkinson at trial, but did not limit its review to that evidence:

> At trial, however, Wilkinson did not call Miller-Hardy to testify. Instead, Wilkinson presented the trial testimony of Dr. Wright, who testified there was a "commonality" of personnel between the board of directors of the various Hillcrest Entities and HMC. The focus of Wright's testimony was on the accreditation process and the adoption of certain standards of care at Hillcrest Medical Center, but had little or nothing to do with the Hillcrest Entities or their

> relationship to each other. The trial court did not permit Wright to testify further concerning the interrelationship between Hillcrest Medical Center and the Hillcrest Entities, as it was clear the witness' familiarity with those entities was limited, and thus lacked sufficient foundation to be used as a basis of expert opinion. While Wilkinson's brief upon appeal claims this evidence was improperly excluded, that allegation of trial error has been waived. We are left with a record containing the single bare allegation that the various Hillcrest Entities have some common board members. We have reviewed the deposition transcript of Dr. Wright taken June 27, 1992, which was opened and reviewed by the trial court. The Pre-Trial testimony of Dr. Wright is critical of some of the Anesthesiologists, but contains no opinions on the relationship between Hillcrest Medical Center and the Hillcrest Entities. Indeed, Wilkinson has not pointed out any such references to this court in any of his Briefs.

Pet. App. at 15a. The Oklahoma Court of Appeals searched the record created by Wilkinson in an effort to determine whether there was evidence supporting a claim against the Hillcrest Respondents. It could find none.

Wilkinson's witness could only observe a "commonality" among the boards of directors of various corporations, as observed from various documents. The Oklahoma Court of Appeals correctly observed: "[t]he showing of a common board of directors and a unity of corporate purpose is insufficient to pierce the corporate veil" so as to hold the Hillcrest Respondents responsible

for a liability of the hospital, a distinct corporate entity. Pet. App. at 17a, citing *Wallace v. Tulsa Yellow Cab Taxi & Baggage Co.*, 178 Okla. 15, 61 P.2d 645 (1936). As the Court specifically held:

> We have meticulously reviewed the record to find evidence introduced by Wilkinson to prove his allegation of inter-corporate agency and an agency relationship between HMC, the Hillcrest Entities, and the individual defendant physicians as alleged by Wilkinson. We find no objective convincing evidence of such.

Pet. App. at 17a. The opinion of the Oklahoma Court of Appeals was neither "arbitrary" nor "utterly irrational". See, Pet. Cert. at 23.

In summary, Wilkinson was not sanctioned solely because he failed to present a claim against the Hillcrest Respondents at trial, but because the record as a whole failed to show a legitimate claim. Wilkinson did not present additional evidence to support the claim at the hearing on sanctions. There is no error in the Opinion of the Oklahoma Court of Appeals, and no refusal by that court to address an issue of federal law. In fact, no such issue was presented to it.

III. CONCLUSION

WHEREFORE, premises considered, the Respondents, Hillcrest Healthcare Corporation, Hillcrest Medical Center Foundation, Hillcrest Real Estate, Inc., and Hillcrest Service Company pray this Court to deny Petitioners' Petition for Writ of Certiorari. The record in this

case clearly establishes that Petitioner was properly sanctioned by the District Court of Tulsa County, State of Oklahoma, and that there was no error in the Opinion of the Oklahoma Court of Appeals affirming certain of those sanctions. Petitioner joined these Respondents as parties to litigation without any proper basis for doing so; he was continuously warned prior to trial of the possibility of sanctions should he fail to present a case against each Defendant, including Respondents. Nevertheless, Petitioner went to trial against Respondents, but failed to make a case against them, for which he was properly sanctioned. No "due process" violation occurred in that process, and certainly no such issue was presented to the Appellate Courts of Oklahoma for consideration.

Respectfully submitted,

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No. 96-6

In The

Supreme Court of the United States

October Term, 1995

WILKINSON AND MONAGHAN, A PROFESSIONAL CORPORATION AND BILL V. WILKINSON,

Petitioners,

v.

HILLCREST HEALTHCARE CORPORATION, HILLCREST MEDICAL CENTER FOUNDATION, HILLCREST REAL ESTATE, INC., HILLCREST SERVICE COMPANY, JERRY L. PULS M.D., DOUGLAS HUBNER, M.D., JERRY L. PULS, M.D., INC., AND SOUTH UTICA PATHOLOGY LABORATORIES, INC.

Respondents.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners, Wilkinson and Monaghan and Bill V. Wilkinson, (hereinafter "Petitioners") have made petition for a Writ of Certiorari to this Court on the ground that this case presents an important issue of procedural due process guaranteed by section 1 of the Fourteenth Amendment to the United States Constitution. The Respondents, Jerry L. Puls, M.D., Douglas Hubner, M.D., Jerry L. Puls, M.D., Inc. and South Utica Pathology Laboratories, Inc., (hereinafter "Respondent Pathologists"), oppose this Court granting the Petition for Writ for all reasons set forth below but primarily on the ground that the Court is without jurisdiction since Petitioners are raising for the first time in the appeal a federal question of procedural due process.

I.

PETITIONERS' FAILURE TO RAISE A FEDERAL QUESTION ON APPEAL IN THE STATE COURT SYSTEM PRECLUDES JURISDICTION IN THIS COURT

As Petitioners' have well explained in their Petition for Writ, the District Court's order of sanctions was appealed to the Oklahoma Supreme Court who assigned the appeal to the Oklahoma Court of Appeals. After that court rendered its decision and declined rehearing, Petitioners filed a Petition for Writ with the State Supreme Court which declined the Writ. For the first time on appeal, Petitioners raise a federal question regarding whether it was a violation of due process for the district judge who ruled on the evidentiary issues at trial to also make a determination regarding the appropriateness of

sanctions against Petitioners. At no time prior to Petitioners' appeal to this Court did they raise a federal question for consideration by the state courts. Consequently, Petitioners have failed to preserve their federal question for consideration by this Court.

The United States Supreme Court has not hesitated to deny Petitions for Writ of Certiorari where a Petitioner has failed to preserve the claim through the appellate process. In the case of *Cardinale v. Louisiana*, 394 U.S. 437 (1969), this Court granted Certiorari but dismissed the Writ during oral argument when it learned that this was the first instance where Petitioner raised a federal question. In doing so, the Court stated, "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Id.*

> In Crowell v. Randell, 10 Pet. 368, 9 L.Ed. 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344, 3 L.Ed. 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, s. 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368,391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, (citations omitted) and since.[1]

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[1] *Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, Inc.*, 360 U.S. 334, 342, n. 7, 79 S. Ct. 1196, 1201, 3 L.Ed.2d 1280 (1959);

In addition, this Court has recognized time and again that there are sound and practical reasons for insisting that federal issues be presented first in the state court system.

> The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness and overbreadth. The rule also insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner. Finally, if the parties to state court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case. In terms of our own workload, this is a very substantial matter.

Webb v. Webb, 451 U.S. 493, 500-501 (1981).

State Farm Mutual Automobile Ins. Co. v. Duel, 324 U.S. 154, 160-163, 65 S. Ct. 573, 576-577, 89 L.Ed. 812 (1945); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435, 60 S. Ct. 670, 672-673, 84 L.Ed. 849 (1940); *Whitney v. California*, 274 U.S. 357, 362-363, 47 S. Ct. 641, 643-644, 71 L.Ed. 1095 (1927); *Dewey v. Des Moines*, 173 U.S. 193, 197-201, 19 S. Ct. 379, 380-381, 43 L.Ed. 665 (1899); *Murdock v. City of Memphis*, 20 Wall. 590, 22 L.Ed. 429 (1875).

This Court in *Webb, supra,* held that where the Petitioner failed to raise in the state court proceedings her federal claim regarding the Full Faith and Credit Clause, the United States Supreme Court was without jurisdiction in the case. Initially, Petitioner asserted that the federal question had been raised and this assertion was not disputed by Respondent. The Court assumed there would be no jurisdictional problem and therefore, granted certiorari. However, once granted, during briefing, it became apparent that Petitioner never actually raised the federal claim below.

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. (citations omitted)

Id. at 496-497. Although Petitioner asserted that she did use the phrase "full faith and credit" at several points in the lower proceedings, this Court held that merely mentioning the full faith and credit clause did not preserve a federal claim under the Federal Constitution. Petitioner never used the phrase "full faith and credit" in the trial proceedings and on appeal never argued the courts failed to reach her federal claim until she petitioned this Court. Consequently, this Court held that the federal question was not properly raised below and that it was without jurisdiction.

In the case of *Bankers Life and Casualty Company v. Crenshaw,* 486 U.S. 71 (1988), this Court declined to grant a petition for Writ of Certiorari to review a punitive damage award on the grounds that Petitioner failed to

raise federal due process and contract claims under the Federal Constitution during the appeal in state court. The Court noted that at no time in its appeal to the state supreme court did the appellant raise a federal constitutional challenge to the size of the punitive damage award prior to that court's affirmance of the award. Although in its petition for rehearing, appellant asserted that the punitive damage award violated "due process, equal protection, and other constitutional standards", this was too "vague" and "oblique" to preserve the Contract Clause or due process claims for the United States Supreme Court. In denying the writ, the Court again noted the policy reasons for raising the federal claims in the state appeal identified in *Webb, supra* and the numerous cases before it.

In the case at bar, Petitioners failed to raise in the courts below the federal question raised now; namely, whether the imposition of sanctions by the trial judge is a violation of Petitioners' constitutional rights to due process pursuant to the Fourteenth Amendment of United States Constitution. Not only did Petitioners fail to raise this issue with the trial court, they failed to raise it with the Oklahoma Court of Appeals and Oklahoma Supreme Court. Noticeably absent from the Petition in Error filed by Petitioners in the state court appeal is a Constitutional claim. In the Petition in Error, the appealing party designates the areas of the law that will be raised on appeal. One such area is constitutional law. At no time did Petitioners ever designate a constitutional issue. APP. 8a.[2]

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[2] References to Respondent Pathologists' Appendix, infra, will be designated as APP ___.

Furthermore, as part of the Petition in Error, the appealing party is to attach an exhibit setting forth the proposed issues and errors to be raised on appeal. Although Petitioners raised 53 propositions of error, none of them set forth a constitutional claim or specifically, a claim for violation of due process pursuant to the Fourteenth Amendment. APP 33a-41a.

It is anticipated Petitioners will argue that they raised this issue in the lower court proceedings through their arguments that the trial judge should have recused when Petitioners requested it. However, in accordance with *Webb, supra,* this is insufficient to preserve a federal claim. It is evident that Petitioners in the case at bar are dissatisfied with the conclusion reached by the state courts of appeal and therefore, artfully construed a constitutional issue to gain jurisdiction with this Court. The case law of this Court is clear that Petitioners' failure to raise and preserve the constitutional issue in the state court system leaves this Court without jurisdiction. Therefore, Respondent Pathologists respectfully request that the Petition for Writ of Certiorari be denied.

II.

THE TRIAL JUDGE HAD THE INHERENT AUTHORITY TO ASSESS SANCTIONS AND HIS CONDUCT IN DOING SO WAS NOT VIOLATIVE OF DUE PROCESS

Petitioners argue that a well established line of due process decisions by this Court regarding methods used to adjudicate and assess sanctions are applicable to the issue raised. In making this argument, Petitioners cite to numerous opinions authored by this Court. However, in

reading each of these cases, Respondent Pathologists submit that Petitioners' cited cases are distinguishable from the case at bar and are not authoritative.

Petitioners rely extensively on this Court's decision of *In re Murchison*, 349 U.S. 133 (1955), in their argument that due process requires a neutral adjudicator at all times. In doing so, Petitioners cite numerous quotations from the opinion that stand for the general proposition that a fair trial in a fair tribunal is a fundamental requirement of due process. This is undisputed. However, a careful review of the facts of that case makes it abundantly clear it is inapplicable to the case at bar. In *Murchison*, a Michigan state judge served as a "one man grand jury" consistent with Michigan law. During the secret grand jury proceedings, two witnesses were cited for contempt. Later, the same judge, after a hearing in open court, adjudged these witnesses guilty of contempt and sentenced them to punishment for events that took place before him in the grand jury proceedings. This Court noted it had previously held that a Michigan "judge grand jury" cannot, consistent with due process, summarily convict a witness of contempt for conduct in a secret hearing. "We held that before such a conviction could stand, due process requires as a minimum that an accused be given a public trial after reasonable notice of the charges, have a right to examine witnesses against him, call witnesses on his own behalf, and be represented by counsel." *Id.* at 134.

Michigan law expressly prohibits a "one man grand jury" from hearing or trying any case arising from his inquiry or from hearing any charge of contempt except for neglect or refusal to appear in response to a subpoena.

The Court stated that it would be a "strange" system if the law permitted a judge acting as a single grand jury in a secret session to then try the very persons accused as a result of his investigations. "Having been a part of that process, a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." *Id.* at 137. The Court further notes that there are circumstances when contempt committed in a trial courtroom can be punished summarily by the trial judge. However, the unique facts and circumstances of *In re Murchison* cannot be likened to that situation. In addition, the Court was concerned that the judge conducting the "judge grand jury" may be called as a material witness in a later trial for contempt.

In re Murchison is not applicable to the case at bar for many reasons. First, it is undisputed that Petitioners were given an opportunity to conduct discovery prior to the evidentiary hearing on sanctions as well as examine witnesses called against them, call witnesses in their own behalf and be represented by counsel. Second, the trial judge in the case at bar was not likely to be called as a material witness at the evidentiary hearing and was wholly disinterested in the outcome of the hearing from either a personal or pecuniary standpoint. The trial judge's interest in the outcome of the case was simply one of managing his courtroom. Finally, this was not a secret investigation in which the judge was both gathering evidence and making accusations. Rather, the trial judge was a neutral adjudicator presiding over a two day evidentiary hearing in an open forum whereby Petitioners actively participated with counsel.

Petitioners also rely on the cases of *Tumey v. Ohio*, 273 U.S. 510 (1927) and *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) for the proposition that due process requires a truly neutral adjudicator before an individual may be deprived of life, liberty or property. These decisions are also distinguishable from the case at bar. Both *Tumey* and *Ward* are cases arising out of the state of Ohio and stand for the proposition that a court adjudicating a matter in which it has a financial interest in the outcome of the decision is an unfair and partial tribunal prohibited by the Fourteenth Amendment. In both cases, the mayors of the villages tried the cases and rendered decisions convicting the petitioners and assessing a monetary penalty for the offense. Under Ohio law, mayors of villages sitting as courts of justice do not receive any fees unless they convict. The greater the fine assessed by the court, the greater the amount of money which the villages receive. As the executive heads of the villages, the mayors had personal financial interests at stake as well as the financial interests of the villages. Not only did a portion of the fee go into the village treasuries, but the mayors also received a portion of the fee as compensation over and above their salary. The Court noted the general rule that officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy. *Tumey* at 522; *Ward* at 60. In both cases, this Court held it was a violation of due process to subject the defendant's " liberty or property to the judgment of a court, the judge of which has a direct, personal substantial, pecuniary interest in reaching a conclusion against him in his case." *Tumey* at 523; and *Ward* at 60.

In addition, Petitioners cite to the case of *Aetna Life Insurance Co. v. Lavoie, et al.*, 475 U.S. 813 (1986) for the same proposition. Like *Tumey* and *Ward*, the *Aetna* case also involves a member of the judiciary with a "direct, personal, substantial and pecuniary" stake in the outcome. As a result of the justice's direct pecuniary interest in the outcome of the case, his involvement in deciding the issues was held to be a violation of the Fourteenth Amendment.

The case at bar shares no similarities with *Tumey*, *Ward* or *Aetna*. There is no suggestion by Petitioners that the trial judge had any "direct, personal, substantial or pecuniary" interest in the outcome of the case. The trial judge would not personally profit from his decision regardless of whether or not he assessed sanctions against these Petitioners for their conduct. Consequently, the cases cited by Petitioners are not authority for their proposition that in order to afford them their Due Process rights someone other than the trial judge had to adjudicate the sanction matter.

Petitioners have also relied on several criminal cases in which counsel was cited for contempt by the trial judge. On appeal, the individual facts of those cases showed that the judicial conduct in citing counsel for contempt was inconsistent with Due Process. As previously discussed, neither this Court nor any other court has held that all cases of contempt citation should be heard by a neutral arbitrator as Petitioners contend. Specifically, Petitioners cite to *Taylor v. Hayes*, 418 U.S. 488 (1974) which is distinguishable from the case at bar. In *Taylor*, the trial judge cited counsel on nine separate occasions for contempt. After the jury returned a guilty

verdict, and in front of the jury, the judge proceeded to impose a jail term for each contempt citation. This was done without giving counsel for the accused an opportunity to be heard in defense or mitigation before he was finally adjudged guilty and sentence imposed. This Court found that denying counsel an opportunity to respond to the charges violated the Due Process Clause of the Fourteenth Amendment. There is no similarity between *Taylor* and this case. It is undisputed that Petitioners were allowed to conduct discovery prior to the evidentiary hearing on sanctions and further, were given notice and an opportunity to be heard at a two day hearing. Consequently, *Taylor* is not authoritative.

Petitioners additionally cite to the case of *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) which is also distinguishable from the case at bar. In *Mayberry*, the trial judge and two defendants cited for contempt became personally embroiled in a conflict on more than one occasion during the trial. The defendants made insulting attacks on the integrity of the judge in front of the jury and leveled many fighting words at him. It was found that the trial judge was so cruelly and personally slandered by the defendants that it would make it difficult to "maintain that calm detachment necessary for fair adjudication." There are no similar facts in the case at bar. Petitioners here never cast such personal aspersions at the trial judge or attacked his judicial integrity in such a way that he could no longer be fair in adjudicating the sanctions matter. In *Ungar v. Sarafite*, 376 U.S. 575 (1964) this Court held that a lawyer's challenge, though "disruptive, recalcitrant and disagreeable commentary," was still not "an insulting attack upon the integrity of the judge carrying

such potential for bias as to require disqualification." Respondent Pathologists respectfully submit that Petitioners behavior warranting sanctions was recalcitrant and disagreeable but did not rise to the level of personal insult upon the trial judge sufficient to warrant his disqualification.

Finally, at footnote 7 in Petitioners brief, they cite to the case of *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980), in support of their statement that "it is well accepted that due process limits the imposition of attorney sanctions." However, it is interesting to note *Roadway* is inopposite to Petitioners' argument that the trial judge cannot be not a neutral adjudicator of sanctions and is supportive of the trial judge's conduct in the case at hand. In *Roadway,* two former employees and one unsuccessful job applicant brought a civil rights class action against Roadway claiming employment policies discriminated on the basis of race and asked for equitable relief. The employees failed to cooperate during the course of discovery and Roadway moved to dismiss the suit under FRCP 37 requesting an award of attorney's fees and court costs as sanctions. The District Court criticized the employees for their "deliberate inaction" in handling the case and as sanctions, ordered them to pay Roadway's costs and attorney's fees for the entire lawsuit in an amount in excess of $17,000.

The issue raised on appeal was whether the court had the authority to award attorney's fees under FRCP 37. This Court held that attorney's fees could be assessed for a party's failure to comply with discovery orders. It remanded the case back to the district court for a specific

finding that counsel's conduct constituted or was tantamount to bad faith, a finding that should precede any sanction under the court's inherent powers. In its opinion, this Court noted that it is the inherent power of the courts to "assess attorney's fees for the willful disobedience of a court order . . . as part of the fine to be levied on the defendant." *Id.* at 751. (citations omitted) It further stated that "like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record. But in a proper case, such sanctions are within a court's powers." *Id.* at 752. It is important to recognize that this case was remanded to the same district judge for further determination in support of his sanctions ruling and at no time does this Court state or even suggest that in order to comply with Due Process, the trial judge should ask a fellow judge to adjudicate the matter.

Moreover, in the case of *Cooter and Gell v. Hartmarx Corp.*, 496 U.S. 384, 403 (1990), this Court held that deference should be given to the trial court who is on the front line of litigation in order to enhance that court's ability to control the litigants before it. This Court stated:

> In directing the district court to impose an "appropriate" sanction, Rule 11 itself indicates that the district court is empowered to exercise its discretion. See also Advisory Committee Note on Rule 11, 28 U.S.C. App., p. 576 (suggesting that a district court "has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted").

* * *

> ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous") *Id.* at 400 citing *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

Petitioners have argued that when the trial court weighed the evidence in the case at bar and then some months later undertook to levy sanctions against Petitioners, this action violated Petitioners due process rights to a "neutral adjudicator". However, this Court's decisions of *Roadway* and *Cooter and Gell* are inopposite to Petitioners' argument. These opinions clearly articulate that it is the district court which is in the best position to determine whether sanctions are appropriate since it is most familiar with the pertinent facts.

Several federal circuit courts have similarly held that the trial judge in litigation properly imposed sanctions pursuant to Rule 11. In the case of *Flip Side Productions, Inc. v. JAM Productions Ltd.*, 843 F.2d 1024 (7th Cir. 1980), the Court upheld the trial court's imposition of sanctions under Rule 11, where after the close of discovery it was apparent that its claim against the Defendant was groundless. In so holding, the Court stated:

> Implicit in the District Court's finding is that it imposed sanctions under Rule 11's frivolousness clause because the Court concluded that, once discovery was closed, Flip Side should have known that the facts and the law then known

> clearly established that Tempo had not violated either the anti-trust laws or RICO. As our earlier analysis of Flip Side's essential facility claims demonstrates, the District Court found that, at the close of discovery, Flip Side had failed to produce any evidence that the alleged Tempo-JAM Agreement had given JAM market power in any market . . . At the close of discovery, because Tempo was not implicated in an anti-trust or RICO violation, Flip Side was obligated to dismiss Tempo or suffer the consequences. Flip Side apparently chose the latter, and the District Court, in its discretion, based upon the "actual position" Flip Side took, imposed sanctions. *We hold that under these circumstances, the District Court properly imposed sanctions pursuant to Rule 11.* (Emphasis added)

See also Eastway Construction Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985); *Advo Systems v. Walters*, 110 F.R.D. 426 (E. D. Mich. 1986); and *City of Yonkers v. Otis Elevator Co.*, 844 F.2d 42 (2d Cir. 1988) (all cases in which it was held that the trial court properly imposed sanctions). Although none of these opinions specifically address whether due process rights were violated, each case articulates the opinion that the District court properly awarded sanctions. Implicit in these opinions is the finding that the rulings were consistent with principles of constitutional law.

III.

THE TRIAL COURT HAD THE AUTHORITY TO ASSESS SANCTIONS AGAINST PETITIONERS

In addition to federal law and specifically, the *Roadway* case, Oklahoma law recognizes a trial court's inherent authority to tax costs and necessary expenditures, including attorneys' fees, against a party whose conduct results in the needless expenditure of costs incurred in defending frivolous litigation. In the case of *City Nat'l Bank v. Owens*, 565 P. 2d 4 (Okla. 1977), the Oklahoma Supreme Court acknowleged the trial court's authority to sanction, stating as follows:

> Courts have long recognized that attorney fees may be awarded when an opponent has acted in bad faith, vexatiously, wantonly or for oppressive reasons, . . . one of the exceptions to the general rule recognized that common law and in modern practice, it is the court's inherent equitable power to award attorneys' fees regardless of the fact that an award is not authorized by statute or contract, whenever overriding considerations, such as oppressive behavior on the part of a party indicate the need for such recovery. *Id.* at 7, 8.

Also, in the case of *Winters v. City of Oklahoma City*, 740 P. 2d 725 (Okla. 1987), the Oklahoma Supreme Court reaffirmed the trial court's inherent authority to assess as sanctions costs and attorneys' fees against an attorney. In *Winters*, counsel for the plaintiff brought suit alleging liability on the part of the City for injury received by a student at a public school. The City filed a Motion to Dismiss and Application to Assess Attorneys' Fees and Costs against the Plaintiff's attorney, alleging that he had

acted in bad faith in asserting municipal liability for the acts of employees of the school system despite adverse rulings on the same issue in three prior cases. The Oklahoma Supreme Court affirmed the trial court's decision describing the court's inherent authority to sanction as follows:

> The power to levy fees against a party who has litigated in bad faith arises from the court's traditional equitable powers . . . Included among these powers was the power to levy attorneys' fees for bad faith litigation. *Id.* at 726.
>
> * * *
>
> "[I]nherent powers" are those which "are necessary to the exercise of all others". These are the court's inherent powers to manage its own affairs so as to achieve the orderly and timely disposition of cases. These powers are implicit in the existence of a judicial system and are a necessary incident to the exercise of a court's jurisdiction. These powers have been expressed in such practices as the contempt citation, sanctions for abusive litigation such as dismissal for failure to prosecute, and the imposition of attorneys' fees on a party for bad faith litigation. *Id.* at 726, 727.

The trial court in the case at bar appropriately exercised its inherent powers in accordance with the Oklahoma Supreme Court's holding in *Winters*. The history of this case as outlined by the Oklahoma Court of Appeals' Opinion found in Petitioners' Appendix (APP 1a) evidences Petitioners bad-faith and abusive conduct for which the imposition of sanctions is appropriate. The Respondent Pathologists urge this Court to recognize the

trial court's inherent power to control Petitioners' behavior and manage its own affairs through the imposition of sanctions and consequently, deny the Petition for Writ of Certiorari.

IV.

THE INDEPENDENT AND ADEQUATE STATE GROUND DOCTRINE IS INAPPLICABLE

Petitioners argue that the state court refused to adjudicate an issue on appeal on the ground that the allegation of trial error had been waived. Petitioners further contend that the state court's determination of waiver does not constitute an independent and adequate state ground to preclude a determination by this Court. However, this doctrine has no applicability to the case at bar since Petitioners failed to raise any federal question throughout their appeal in the state court system.

Generally, according to this doctrine, the Supreme Court is without jurisdiction to review a state court judgment if that judgment rests on a state ground independent of a federal question. One of the purposes of this doctrine is to prevent a state court's ruling on a state procedural matter from precluding a ruling on a federal question. In other words, a litigant's procedural defaults in state proceedings do not prevent assertion of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest.

In support of their contention, Petitioners cite to the case of *Henry v. Mississippi*, 379 U.S. 443, 447 (1965). In *Henry*, the issue was whether the petitioner, upon his failure to timely object to the admission of illegally seized

evidence, had waived his right to a determination of the federal question regarding an alleged unlawful search. The Court found that the state's rule requiring objection to evidence at the time of its introduction clearly did serve a legitimate state interest. But the Court found that this interest might have been substantially served if the state court had taken the opportunity to decide the constitutional issues on the motion for a directed verdict at the close of the state's case. Consequently, this Court remanded the case for a determination as to whether Petitioner had waived the federal claim in question.

In the case at bar, specifically, Petitioners claim that the trial court improperly precluded one of Plaintiffs' expert witnesses from testifying regarding the alleged interrelationship of several corporate entities. In their opinion, the Court of Appeals notes that this allegation has been waived along with several others. "Wilkinson's petition in error sets out fifty-three propositions of error. Wilkinson's brief preserves but one: whether or not the sanctions levied were an abuse of the trial court's discretion." Petitioners' Appendix 6a. See also APP 33a-41a. It has long been the law of this state that propositions of error not outlined in the Petition in Error are deemed waived.[3]

In the case at bar, there never was a federal question presented in the state court system. Consequently, the Oklahoma Court of Appeals' determination that review

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[3] *Hadnot v. Shaw*, 826 P. 2d 978 (Okla. 1992); *American First Abstract Co. v. Western Information Systems, Inc.*, 735 P. 2d 1187 (Okla. 1987); *State ex rel. Remy v. City of Norman*, 642 P. 2d 219 (Okla. 1981); *Peters v. Golden Oil Co.*, 600 P. 2d 330 (Okla. 1979).

of the trial court's evidentiary rulings were waived did not effect a federal question. It naturally follows that in order for the Independent and Adequate State Grounds Doctrine to be applicable, there must be a federal question properly preserved for appellate review. This again is where Petitioners' argument fails. Petitioners failed to raise any federal question prior to their petition to this Court. Consequently, the Oklahoma Court of Appeals' alleged failure to review an issue they deemed waived as a result of Petitioners failure to comply with a state procedural rule does not preserve the issue for this Court's review. As a result, this doctrine has no applicability to the case at bar.

CONCLUSION

Petitioners failure to properly preserve their alleged federal question by raising it in the state court system precludes jurisdiction in this Court. There is a long line of Supreme Court cases which articulate the importance of adjudicating the federal question throughout the appeal rather than raising it for the first time with this Court. Consequently, the Petition for Writ of Certiorari should be denied for lack of jurisdiction. However, in the event the Court looks beyond the jurisdictional issue to the substantive issues, Petitioners have failed to state a claim for consideration. The trial court exercised its inherent authority to manage its affairs and control its courtroom in assessing sanctions. As evidenced by case law, trial courts time and again exercise this power where warranted without constitutional violation. Petitioners have failed to present either authority or evidence to establish

that the case at bar was so unique that they required an adjudicator other than the trial judge. Consequently, Respondent Pathologists respectfully request this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

WILLA WARNER, LINDA JONES, and MERLE LEVITT, Personal Representatives of the Estate of Norma Levitt, deceased, Plaintiffs/Appellees v. HILLCREST MEDICAL CENTER, a corporation, HILLCREST HEALTHCARE CORPORATION, HILLCREST MEDICAL CENTER FOUNDATION, HILLCREST REAL ESTATE, INC., HILLCREST SERVICE COMPANY, FREDERICK JONES, M.D., GARY BREIPOHL, M.D., JONATHAN ANTHONY, M.D., ROBERT MORTON, M.D., ROBERT SPOHR, M.D., THOMAS SINGLETARY, M.D., HAROLD VOSS, M.D., DAN WIESEMEYER, M.D., JERRY PULS, M.D., DOUGLAS HUBNER, M.D., DUANE BROTHERS, M.D., CHRISTINE JONES, CRNA, and TULSA ANESTHESIOLOGISTS, INC., an Oklahoma corporation, JERRY L. PULS, M.D., INC., and SOUTH UTICA PATHOLOGY, LABORATORIES, INC., Defendants/Appellees	No. CJ-90-3403 No. CJ-91-2677 Consolidated March 20, 1992 S. Ct. No. ___

MERLE LEVITT, WILLA WARNER and LINDA JONES,

Plaintiffs/Appellees

v.

HILLCREST MEDICAL CENTER, a corporation, HILLCREST HEALTHCARE CORPORATION, HILLCREST MEDICAL CENTER FOUNDATION, HILLCREST REAL ESTATE, INC., HILLCREST SERVICE COMPANY, FREDERICK JONES, M.D., GARY BREIPOHL, M.D., JONATHAN ANTHONY, M.D., ROBERT MORTON, M.D., ROBERT SPOHR, M.D., THOMAS SINGLETARY, M.D., HAROLD VOSS, M.D., DAN WIESEMEYER, M.D., JERRY PULS, M.D., DOUGLAS HUBNER, M.D., DUANE BROTHERS, M.D., CHRISTINE JONES, CRNA, and TULSA ANESTHESIOLOGISTS, INC., an Oklahoma corporation, JERRY L. PULS, M.D., INC., and SOUTH UTICA PATHOLOGY, LABORATORIES, INC.,

Defendants/Appellees

and

WILKINSON AND MONAGHAN, A Professional Corporation, and BILL V. WILKINSON,

Appellants.

PETITION IN ERROR
(AND PRELIMINARY STATEMENT)

_X_ PETITION IN ERROR ___ CROSS-PETITION

___ AMENDED PETITION ___ COUNTER-PETITION

If the petition is an amended petition, state purpose of amendment. N/A.

If the petition is a cross-petition or counter-petition, state the date that the original petition in error in the appeal was filed with the Clerk of this Court. ___N/A_____

Type of Case in Supreme Court:
(Check one)

_X_ Judgment or final Order of District Court (Rule 1.10)
___ Corp. Commission (Oil & Gas) (Rule 1.85)
___ Corp. Commission (Utility) (Rule 1.85)
___ Insurance Dept. (Rule 1.55)
___ Tax Commission (Rule 1.25)
___ Court of Tax Review (Rule 1.140)
___ Banking board or Commissioner (Rule 1.155)
___ Other _____
(Explain)

A. TRIAL COURT HISTORY

COURT/TRIBUNAL:	District Court of Tulsa County
COUNTY:	Tulsa County
CASE NO.:	No. CJ-90-3403 and No. CJ-91-2677 (Consolidated March 20, 1992)
JUDGE:	David L. Peterson

DATE JUDGMENT OR ORDER APPEALED PRONOUNCED: April 11, 1994.

DATE THE JUDGMENT OR ORDER WAS FILED: April 11, 1994.

WAS APPELLANT OR APPELLANT'S ATTORNEY PRESENT WHEN THE JUDGMENT OR ORDER WAS PRONOUNCED? ___ Yes _X_ No

WAS A PARTY OR CLERK DIRECTED TO MAIL A COPY OF THE JUDGMENT OR ORDER TO THE APPELLANT? _X_ Yes ___ No

IF MAILING A COPY OF THE JUDGMENT OR ORDER WAS DIRECTED DOES THE TRIAL COURT RECORD SHOW THAT THE JUDGMENT OR ORDER WAS MAILED TO THE APPELLANT WITHIN FIVE (5) DAYS OF THE DATE THE JUDGMENT OR ORDER WAS FILED? _X_ Yes ___ No

IF MAILING WAS ORDERED, ON WHAT DATE WAS THE ORDER MAILED TO THE APPELLANT?

BY DISTRICT COURT CLERK: APRIL 11, 1994.
(Date mailed)

BY OTHER PARTIES:

1.	_____ Date mailed.	_____ Name of party who mailed the order.
2.	_____	_____
	_____	_____

POST-TRIAL MOTION?

	Type and Authority	Date Filed in Trial Court
1.	_____	_____
2.	_____	_____
3.	_____	_____

DATE OF DISPOSITION OF POST-TRIAL MOTION OR MOTIONS.

	Type	Date Disposed in Trial Court
1.	_____	_____
2.	_____	_____
3.	_____	_____

B. DISPOSITION IN TRIAL COURT OR TRIBUNAL

NATURE OF JUDGMENT OR ORDER APPELLANT SEEKS TO REVERSE:

Two Orders were entered on April 11, 1994, which Appellant seeks to reverse:

(1) Order on Attorney's Lien: Denial of Appellant's costs and attorneys fees under attorney fee contract.

(2) Findings of Fact and Conclusions of Law: Award of costs and attorney fees as sanctions against Appellant.

RELIEF SOUGHT BY APPELLANT IN TRIAL COURT OR TRIBUNAL:

Appellant sought an award of costs and attorney fees pursuant to attorney fee contract against Appellees in a separate suit, Case No.

CJ-93-02879 (the "lien foreclosure case"). Appellant did not file its attorney's lien in this action. However, the Trial Court entered its Order on Attorney's Lien, adjudicating Appellant's rights in the lien foreclosure case in this action.

In a separate order on the same day the Trial Court granted applications by Appellees and invoked sanctions against Appellant.

RELIEF GRANTED BY TRIAL COURT OR TRIBUNAL:

Order substantially denying Appellant's rights under its Attorney's Lien.

Order invoking sanctions against Appellant.

RELIEF SOUGHT BY APPELLEE IN TRIAL COURT OR TRIBUNAL:

Appellee sought costs and attorneys fees as sanctions against Appellant in the trial court.

Appellee sought determination that Appellant's attorney lien contract was invalid.

RELIEF GRANTED BY TRIAL COURT OR TRIBUNAL:

Application for costs and attorney fees as sanctions against Appellant granted.

Judicial determination that attorney lien contract is invalid.

JUDGMENT ON LESS THAN ALL CLAIMS OR PARTIES.

DID THE TRIAL COURT ADJUDICATE LESS THAN ALL OF THE CLAIMS OR PARTIES PRESENTED? ___ Yes _X_ No. IF SO, DID THE TRIAL COURT MAKE AN EXPRESS DETERMINATION THAT LESS THAN ALL OF THE CLAIMS OR PARTIES PRESENTED SHOULD BE

DECIDED AND EXPRESSLY DIRECT THE FILING OF A FINAL JUDGMENT? ___ Yes _X_ No

EXHIBIT "A" attached. (Two Orders)

C. SUMMARY OF CASE

Exhibit "B" attached.

D. ISSUES AND ERROR8 PROPOSED TO BE RAISED ON APPEAL

Exhibit "C" attached.

ANY RELATED OR PRIOR APPEALS:

_X_ Yes ___ No

If so, identify by style, citation if any, and Supreme Court Number.

WILLA WARNER, LINDA JONES, and MERLE LEVITT, Plaintiffs/Appellees v. HILLCREST MEDICAL CENTER, a corporation, HILLCREST HEALTHCARE CORPORATION, HILLCREST MEDICAL CENTER FOUNDATION, HILLCREST REAL ESTATE, INC., HILLCREST SERVICE COMPANY, FREDERICK JONES, M.D., GARY BREIPOHL, M.D., JONATHAN ANTHONY, M.D., ROBERT MORTON, M.D., ROBERT SPOHR, M.D., THOMAS SINGLETARY, M.D., HAROLD VOSS, M.D., DAN WIESEMEYER, M.D., JERRY PULS, M.D., DOUGLAS HUBNER, M.D., DUANE BROTHERS, M.D., CHRISTINE JONES, CRNA, and TULSA ANESTHESIOLOGISTS, INC., an Oklahoma corporation, JERRY L. PULS, M.D., INC., and SOUTH UTICA PATHOLOGY, LABORATORIES, INC., Defendants/Appellees, MERLE

LEVITT, WILLA WARNER and LINDA JONES, Plaintiffs/Appellees v. HILLCREST MEDICAL CENTER, a corporation, HILLCREST HEALTHCARE CORPORATION, HILLCREST MEDICAL CENTER FOUNDATION, HILLCREST REAL ESTATE, INC., HILLCREST SERVICE COMPANY, FREDERICK JONES, M.D., GARY BREIPOHL, M.D., JONATHAN ANTHONY, M.D., ROBERT MORTON, M.D., ROBERT SPOHR, M.D., THOMAS SINGLETARY, M.D., HAROLD VOSS, M.D., DAN WIESEMEYER, M.D., JERRY PULS, M.D., DOUGLAS HUBNER, M.D., DUANE BROTHERS, M.D., CHRISTINE JONES, CRNA, and TULSA ANESTHESIOLOGISTS, INC., an Oklahoma corporation, JERRY L. PULS, M.D., INC., and SOUTH UTICA PATHOLOGY, LABORATORIES, INC., Defendants/Appellees; and WILKINSON AND MONAGHAN, A Professional Corporation, and BILL V. WILKINSON, Appellants. No. CJ-90-3403 and No. CJ-91-2677, Consolidated March 20, 1992; S. Ct. No. 82,685.

Court Reporters' estimate of number of transcribed pages: 6,700.

CHECK THE APPLICABLE ISSUES INVOLVED IN THE APPEAL:

___	01	Administrative Law and Procedure
___	02	Appeal and Error
X	03	Attorneys
___	04	Bankruptcy
___	05	Banks and Banking
___	06	Bond Forfeitures
___	07	U.C.C.
___	08	Constitutional Law
X	09	Contracts

___	10	Corporation Commission
___	11	Corporations & Partnerships
X	12	Courts
X	13	Damages
___	14	Estates, Trusts, & Guardianships
___	15	Family Law
___	16	Insurance
___	17	Labor Law
___	18	Manufacturer's & Products Liability
___	19	Oil & Gas Law
X	20	Procedure
___	21	Property Law
___	22	Schools & School Districts
___	23	Taxation
X	24	Torts
___	25	(No number 25)
___	26	Water Law
___	27	Government
___	28	42 U.S.C. § 1983
___	29	Jurisdiction & Venue
___	30	Elections/Initiative Petns.
___	31	Prisoners
___	32	Arbitration
___	33	Securities
___	34	Consumer Law
___	35	Patents & Trademarks
___	36	Indian Law
___	37	Municipal Law
___	38	Governmental Tort Claims Act
___	39	Garnishment & Execution
___	40	Discovery
___	41	Licenses
X	42	Evidence
___	43.	Guaranty & Suretyships
X	44	Liens, Mortgages & Notes
___	45	Interest

List by general topic as set forth above any other issues involved in this appeal: 12 O.S. § 2011 Sanctions.

E. ALL APPELLANTS MUST SHOW HOW THE APPEAL IS TIMELY BROUGHT

Place an "X" in the appropriate category the appellant is relying on to show a timely appeal.

I. JUDGMENTS AND FINAL ORDERS OF THE DISTRICT COURT

THE APPEAL FROM THE JUDGMENT OR FINAL ORDER HEREIN IS TIMELY BROUGHT BECAUSE:

1. THE PETITION IN ERROR WAS DELIVERED TO THE CLERK OF THE SUPREME COURT WITHIN THIRTY DAYS OF THE DATE THE JUDGMENT OR FINAL ORDER WAS:

   X A. FILED WITH THE DISTRICT COURT CLERK, OR

   ___ B. MAILED TO THE APPELLANT BY THE DISTRICT COURT CLERK OR ANOTHER PARTY AND THE COURT RECORDS DO NOT REFLECT THE MAILING OF A COPY OF THE JUDGMENT WITHIN FIVE DAYS OF ITS FILING, OR

2. THE PETITION IN ERROR WAS MAILED TO THE CLERK OF THE SUPREME COURT BY U.S. CERTIFIED MAIL, RETURN RECEIPT REQUESTED ON _____, AND THE STATED DATE OF MAILING WAS WITHIN THIRTY DAYS OF:

   ___ A. THE DATE THE JUDGMENT WAS FILED WITH THE DISTRICT COURT CLERK, OR

___ B. THE DATE THE JUDGMENT WAS MAILED TO THE APPELLANT BY THE DISTRICT COURT CLERK OR ANOTHER PARTY AND THE COURT RECORDS DO NOT REFLECT THE MAILING OF A COPY OF THE JUDGMENT WITHIN FIVE DAYS OF ITS FILING, OR

3. _____

_____

_____.

II. FINAL ORDERS OF OTHER TRIBUNALS

THE APPEAL HEREIN IS FROM A FINAL ORDER OF THE _____. (Corporation Commission, Insurance Department, Tax Commission, Court of Tax Review, Banking Board or Banking Commissioner, etc.)

THE APPEAL HEREIN IS PROSECUTED UNDER THE AUTHORITY OF: Rules of Appellate Procedure in civil cases.

THE APPEAL HEREIN IS TIMELY BROUGHT BECAUSE:

X A. THE SPECIFIC STATUTORY AUTHORITY FOR THE APPEAL PROVIDES THAT THE PETITION IN ERROR SHALL BE FILED IN THE SUPREME COURT WITHIN THIRTY DAYS OF THE DATE THE ORDER WAS RENDERED OR PRONOUNCED AND THE PETITION IN ERROR WAS:

___ 1. Mailed to the Clerk of the Supreme Court by U.S. Certified Mail, return receipt requested, on ___. AND The stated date of mailing was within thirty days of the date the order was rendered or pronounced. OR

X 2. Delivered to the Office of the Clerk of the Supreme Court for filing within thirty days of the date the order was rendered or pronounced. OR

___ B. THE SPECIFIC STATUTORY AUTHORITY FOR THE APPEAL PROVIDES THAT THE PETITION IN ERROR SHALL BE FILED IN THE SUPREME COURT WITHIN THIRTY DAYS OF THE DATE THE ORDER WAS MAILED TO THE APPELLANT AND THE PETITION IN ERROR WAS:

___ 1. Mailed to the Clerk of the Supreme Court by U.S. Certified Mail, return receipt requested, on ___. AND The stated date of mailing was within thirty days of the date the order was mailed to the appellant. OR

___ 2. Delivered to the Office of the Clerk of the Supreme Court for filing within thirty days of the date the order was mailed to the appellant. OR

___ C. _____
_____
_____
_____.

F. IS APPELLANT WILLING TO PARTICIPATE IN AN ATTEMPTED SETTLEMENT OF THE APPEAL BY PREDECISIONAL CONFERENCE UNDER COURT OF APPEALS RULE 3.7 IF OFFERED THE OPPORTUNITY?

___ Yes X No

G. IS APPELLANT AGREEABLE TO ACCELERATE PROCEDURES FOR THIS APPEAL UNDER COURT RULE?

X Yes ___ No

H. NAME OF COUNSEL
(With telephone number and address)

ATTORNEY FOR APPELLANTS:

Name: Bill V. Wilkinson
Firm: Wilkinson & Monaghan
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Tulsa, OK 74145
Telephone No. 918-663-2252

Name: Murray E. Abowitz
Firm: Abowitz, Welch & Rhodes, P.C.
15 N. Robinson, 10th Floor
Oklahoma City, OK 73101
Telephone No. 405-236-4645

ATTORNEY FOR APPELLEES:

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Firm: Richards, Paul, Richards & Seigel
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Name: W. C. Sellers
Firm: W. C. Sellers
Address: 600 S. Main
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Telephone: 918-224-5357

Name: Joe Best
Firm: Best, Sharp, et al
Address: 100 W. 5th, #808
Tulsa, OK 74103
Telephone: 918-582-1234

I. DATE May 10, 1994 **Verified by:**

/s/ Bill Wilkinson
Name: Bill V. Wilkinson
OBA # 9621
Firm: Wilkinson & Monaghan
Address: 7625 E. 51st, #400
Tulsa, Oklahoma 74145
Telephone No. 918-663-2252

Name: Murray E. Abowitz
OBA # 000117
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Address: 15 N. Robinson, 10th Floor
Oklahoma City, OK 73101
Telephone: 405-236-4645

J. AFFIDAVIT OF MAILING TO APPELLEE AND DISTRICT COURT CLERK ON DAY OF FILING IN SUPREME COURT

I hereby certify that a true and correct copy of the above and foregoing Petition in Error was mailed this 9th day of May, 1994, to the following by depositing in the U.S. Mails, postage prepaid:

Michael W. Hill
Secrest & Hill
Suite 900, 7134 South Yale
Tulsa, Oklahoma 74136

John R. Paul
9 East Fourth, Suite 400
Tulsa, Oklahoma 74103;

Michael P. Atkinson
525 South Main, Suite 1500
Tulsa, Oklahoma 74103

Stephen J. Rodolf
2700 Mid-Continent Tower
401 South Boston
Tulsa, OK 74103

W. C. Sellers
600 S. Main
Sapulpa, Oklahoma 74067

Joseph M. Best
Suite 808, 100 West 5th
Tulsa, OK 74103

I further certify that a true and correct copy of the above and foregoing Petition in Error was filed in the Office of the Court Clerk of Tulsa County, on the 9th day of May, 1994.

/s/ Bill Wilkinson
Bill V. Wilkinson

IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

WILLA WARNER, et al. Plaintiffs, v. **HILLCREST MEDICAL CENTER**, et al., Defendants.	)	No. CJ-90-3403
and **MERLE LEVITT**, et al. Plaintiffs, v. **HILLCREST MEDICAL CENTER**, et al. Defendants.	)	NO. CJ-91-2677 (Filed Apr. 11, 1994) CONSOLIDATED 3/20/92

ORDER ON ATTORNEY'S LIEN

In the above-styled cases the Court finds as follows:

1. That Bill V. Wilkinson and his law firm were discharged by these clients for good cause after Mr. Wilkinson lost the case.

2. Mr. Wilkinson's Fee Agreement contract appears to be against public policy and contrary to the intent of the Oklahoma statutes and stated that if no recovery was made, there would be no attorney's fee owed. Settlement in this matter was achieved by a different law firm hired by the clients after Wilkinson was discharged. Simply staying within the four corners of the document shows

that neither Mr. Wilkinson or his law firm should have any fee.

3. During the hearings on sanctions March 29-30, 1994, more than one defense attorney present during the trial accused Mr. Wilkinson of negligence and incompetence in his conduct of the case.

4. These accusations were neither rebutted nor denied by Mr. Wilkinson and are therefore deemed to be admitted.

5. Mr. Wilkinson during the trial failed to either understand or follow the standard rules of evidence or the rules of proper attorney conduct.

6. The case was settled because of the expertise of the Sellers Law Firm and because the Court had under advisement a motion for new trial based on incompetent representation.

7. It would be improper to grant fees under the circumstances in this case.

8. That the fact of the case being initially filed with court costs and service fees on four defendants paid may have been of some benefit and should therefore be reimbursed.

9. The finding of an expert such as Dr. Zuck and obtaining his opinion *may*? have been of assistance to the Sellers' Law Firm.

THEREFORE, this Court finds that this order is a complete determination of the attorney's lien rights applied for by Mr. Wilkinson; that such a determination serves as Res Judicata to Case No. CJ-93-2879, which is

redundant and should be dismissed. Mr. Wilkinson seems to forget that he *lost* the case. Further, that the funds on deposit with the Creek County Probate Court may be disbursed to the clients by the Probate Court in its discretion and that the initial court costs ($184.00) should be paid to Mr. Bill V. Wilkinson, as well as the monies expended for Dr. Zuck ($17,394.00).

/s/ David L. Peterson
DAVID L. PETERSON,
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on the 11 day of April, 1994, I mailed a true and correct copy of the above and foregoing to the following with sufficient postage thereon fully prepaid:

JOSEPH M. BEST
100 West 5th St., Suite 808
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TONY JACK LYONS
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Pryor, OK 74362

GARY W. DAVIS
20 N. Broadway,
Suite 1800
Oklahoma City, OK 73102

SALLY HOWE-SMITH,
COURT CLERK

/s/ Marianne Moffett
Marianne Moffett,
Deputy Court Clerk

IN THE DISTRICT COURT IN
AND FOR TULSA COUNTY
STATE OF OKLAHOMA

WILLA WARNER, et al., Plaintiffs, vs. **HILLCREST MEDICAL CENTER,** a corporation, et al., Defendants. and **MERLE LEVITT,** et al., Plaintiffs, vs. **HILLCREST MEDICAL CENTER,** a corporation, et al., Defendants.	No. CJ-90-3403 (Consolidated with CJ-91-2677) (Filed Apr. 11, 1994)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to the order of the Court entered on January 18, 1994, this matter came on for hearing at 9:30 a.m. on the 29th day of March, 1994 and continued through March 30, 1994 on the motions of the Defendants Hillcrest Healthcare Corporation, Hillcrest Medical Center Foundation Hillcrest Service Company, Hillcrest Real Estate, Inc. (hereinafter referred to as Hillcrest Entities), Dr. Gary Breipohl, M.D., Dr. Jonathan Anthony, M.D., Dr. Robert Spohr, M.D., Dr. Thomas Singletary, M.D., Dr. Harold Voss, M.D., Dr. Dan Wiesemeyer, M.D., Dr. Duane

Brothers, M.D., (hereinafter referred to as Anesthesiologists), and Dr. Frederick Jones, M.D., (hereinafter referred to as Jones) and Dr. Douglas Hubner, M.D., Dr. Jerry Puls, M.D., Jerry L. Puls, M.D., Inc., and South Utica Pathology (hereinafter referred to as Pathologists), for sanctions against Bill V. Wilkinson, personally and the law firm of Wilkinson & Monaghan.

The Court, having reviewed the pleadings and briefs filed in said cause, heard the sworn testimony of witness and the arguments of counsel, being fully advised in the premises, does hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT

I.

The above named Defendants were joined as party defendants on or about November 8, 1991, by the filing of an Amended Complaint signed by Mr. Bill V. Wilkinson, individually and on behalf of the law firm of Wilkinson & Monaghan.

II.

During the pretrial proceedings the Hillcrest Entities filed a Motion for Summary Judgment based on the fact that they did not control the methods for providing medical services for patients of Hillcrest medical Center, and were not otherwise liable. Mr. Bill W. Wilkinson continually assured the Court there would be evidence of legally responsible control. During pretrial proceedings the Pathologists, Fred Jones and the Anesthesiologists made

numerous oral motions for summary judgment and requests for dismissal on the grounds that there had been no evidence adduced during discovery which would justify the Court submitting these Defendants to the jury.

III.

During the pretrial procedures the Court advised Mr. Bill V. Wilkinson on several occasions, including the pretrial conference, that he should evaluate and re-examine his allegation against the above-named Defendants, that lawsuits are a traumatic experience to all parties and their families, and he should dismiss those against whom he had no viable case to submit to the jury. The Court further advised Mr. Bill V. Wilkinson that his failure to so do might result in sanctions. The Court denied summary judgment to the Hillcrest Entities on the basis of an affidavit from Dianne Miller Hardy whose testimony Mr. Wilkinson assured the Court, would make the requisite link between the Hillcrest Entities and the allegations in his Amended Complaint. Mr. Wilkinson never called Dianne Miller Hardy to testify.

IV.

The trial of this case ran from April 20, 1993 until May 18, 1993, a period of twenty-one days, despite assurances it would be two weeks or less.

V.

At the conclusion of the evidence on behalf of the Plaintiff in said cause, the Court sustained demurrers and

dismissed the Hillcrest Entities, the Pathologists, Dr. Fred Jones, and all of the moving Anesthesiologists, with the exception of Dr. Thomas Singletary, M.D. At the conclusion of all the evidence, the Court sustained a Motion for Directed Verdict on behalf of Dr. Thomas Singletary, M.D. and dismissed him from the lawsuit.

VI.

The jury returned a verdict for the four remaining Defendants, Hillcrest Medical Center, Chris Jones, C.R.N.A., Dr. Robert Morton, M.D. and Tulsa Anesthesiologists, Inc. At that time the Court dismissed the companion case (CJ-91-2677) because no viable claims remained.

VII.

Subsequent to the trial of said cause, the Hillcrest Entities, Anesthesiologists, Jones and Pathologists each filed motions for sanctions and costs predicated upon the violation of 12 O.S. 1991 §2011 by Mr. Bill V. Wilkinson and the law firm. Said motions were set for hearing and heard by the Court on March 29 and March 30, 1994.

VIII.

The Hillcrest Entities presented expert testimony that their joinder as party defendants was in violation of 12 O.S. 1991 §2011, as there was no evidence showing that there was a reasonable basis to believe that the allegations made against them were well grounded in fact, or warranted by existing law. Mr. Bill V. Wilkinson and the

law firm failed to produce any evidence that the Hillcrest Entities were involved in providing medical care and treatment to Norma Levitt. The failure of Mr. Bill V. Wilkinson and/or the law firm to dismiss them from the action pursuant to the admonitions and pleading of the trial court amounted to harassment of these entities, caused unnecessary delays in the discovery and trial of said cause, and amounted to a needless and tremendous increase in the cost and time of litigation. The Hillcrest Entities presented expert testimony as to the reasonableness and necessity of the costs incurred by way of attorney fees and other costs, said testimony further established that the attorney fees charged were in conformity with the usual charges in the Tulsa area.

IX.

The Pathologists presented evidence that Mr. Bill V. Wilkinson and the law firm were guilty of violation of 12 O.S. 1991 §2011 as there was no evidence showing that there was a reasonable basis to believe that the allegations made against them were well grounded in fact, or warranted by existing law. Mr. Bill V. Wilkinson testified under oath in response to Pathologists' attorneys that prior to joining them as party defendants he did not contact or consult with any pathologist to ascertain whether the alleged conduct of Pathologists was below the standard of care. Furthermore, the evidence adduced at the hearing showed that at the close of discovery, not one of Plaintiffs' experts had testified in deposition that the Pathologists acted or failed to act in such a manner that they caused or contributed to the death of Norma Levitt. The failure of Mr. Bill V. Wilkinson and/or the law

firm to dismiss the Pathologists from the action, pursuant to the admonition and pleading of the trial judge, amounted to harassment of these doctors, caused unnecessary delays in the discovery and trial of said cause, and amounted to a needless increase in the cost and time of litigation. The Pathologists presented expert testimony as to the reasonableness and necessity of the costs incurred by way of attorney fees and other costs, and said testimony further established that the attorney fees charged were in conformity with the usual charges in the Tulsa area.

X.

The Anesthesiologists presented expert testimony that they had no involvement in the care and treatment of Norma Levitt, and their joinder as party defendants was in violation of 12 O.S. 1991 §2011, and there was no evidence establishing a reasonable basis to believe that the allegations made against them were well grounded in fact, or warranted by existing law. Mr. Bill V. Wilkinson and the law firm failed to produce any evidence that the moving Anesthesiologists were involved in the care and treatment of Norma Levitt. The failure of Mr. Bill V. Wilkinson and/or the law firm to dismiss them from the present action, pursuant to admonition and pleading of the trial court, amounted to harassment of these entities, caused unnecessary delays in the discovery and trial of said cause, and resulted in a needless increase in the cost and time of litigation. The Anesthesiologists presented expert testimony as to the reasonableness and necessity of the costs incurred by way of attorney fees and other related costs, said testimony further established that the

attorney fees charged were in conformity with the usual charges in the Tulsa area.

XI.

Dr. Frederick Jones presented expert testimony that his joinder as a party defendant was in violation of 12 O.S. 1991 §2011, and there was no evidence establishing a reasonable basis to believe that the allegations made against him were well grounded in fact, or warranted by existing law. Mr. Bill V. Wilkinson and the law firm failed to produce any evidence at the trial that Dr. Frederick Jones violated the standard of care in the treatment which he rendered to Norma Levitt. The failure of Mr. Bill V. Wilkinson and the law firm to dismiss Dr. Frederick Jones from the action pursuant to the admonition and pleading of the trial court, amounted to harassment of Dr. Frederick Jones, caused unnecessary delays in discovery and trial of said cause, and amounted to a needless increase in the cost and time of litigation, particularly as to Dr. Frederick Jones. Dr. Frederick Jones further presented expert testimony as to the reasonable necessity of costs incurred by way of attorney fees and other costs. Said testimony further established that the attorney fees charged were in conformity with the usual charges in Tulsa County.

XII.

Mr. Bill V. Wilkinson and the law firm failed to meet their burden of proof in opposing the Defendants' motions for sanctions by wholly failing to reveal what, if any, evidence was accumulated prior to the time that the

Amended Petition was filed or during discovery in respect to the liability for each Hillcrest Entity. Instead, Mr. Bill V. Wilkinson merely attempted to demonstrate that the Court was mistaken on certain evidentiary rulings during the trial, as based on his "interpretation," and that but for those rulings, the "evidence" would have come in. The Court is still left to speculate whether the required "evidence" ever existed and the exact nature of the "evidence." The focus of the authorities and argument of Mr. Bill V. Wilkinson was totally misdirected and nonsensical. Again, the fact that evidentiary rulings were made, even if adverse to his unique understanding of the rules of evidence, does not preclude Mr. Bill V. Wilkinson from now revealing to the Court the precise evidence he accumulated to meet the requirements of 12 O.S. §2011 and to establish liability. Mr. Wilkinson still fails to understand that the separate act of each defendant must be shown to create liability for any of them.

XIII.

The Court finds that neither Mr. Bill V. Wilkinson nor the law firm offered any sworn testimony at the trial in 1993 or at the sanctions hearings on March 29 and March 30, 1994 in opposition to the reasonableness of the attorney fees offered on behalf of the Hillcrest Entities, Pathologists, Anesthesiologists, and Dr. Frederick Jones or on behalf of his cross-claim for sanctions.

CONCLUSIONS OF LAW

Any finding of fact which should be designated as a conclusion of law is hereby denominated as a conclusion of law.

I.

The Court finds that the Hillcrest Entities, Pathologists and Anesthesiologists are the proper parties to seek sanctions. *Sassower v. Field*, 138 F.R.D. 369 (S.D. New York 1991). 12 O.S. 1991 §2017 mirrors Federal Rule 17(a); therefore federal decisions interpreting Rule 17 and the law applicable thereto are persuasive authority under Oklahoma law. *First Life Assurance Company v. Mountain*, 848 P.2d 117 (Okl. App. 1993).

II.

The signature of an attorney of party constitutes a certificate by him that he has read the pleading, motion, or other paper, and that to the best of his knowledge, information, and belief, formed after reasonable inquiry, it is well-grounded in fact and warranted by existing law. The signing of the Amended Petition, Response to Motion for Summary Judgment, and Pre-Trial Order by Mr. Wilkinson in this case constitutes such a certificate.

III.

12 O.S. Section 2011 imposes an affirmative obligation upon litigants to stop and think before initially making legal or factual contentions; Section 2011 also imposes a duty to refrain from continuing to advocate a position

or prosecute a claim which has ceased to have any merit or after it becomes clear the claim has no merit; Section 2011 also mandatorily requires the Court to apply sanctions when warranted.

IV.

To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the Court must, to the extent possible, limit the scope of sanction proceedings to the record. Thus, discovery should be conducted only by leave of the Court, and then only in extraordinary circumstances. Rule 11, *Advisory Committee Notes*, 1983 Amendment. As a matter of law, the discovery conducted by Mr. Wilkinson was appropriate under the circumstances, but the additional discovery requests and pending Motions to Compel and Motion to Inspect would not be in compliance with the Rule, and are overruled.

V.

The failure of Mr. Bill V. Wilkinson and the law firm to conduct a reasonable investigation or to produce any competent evidence which was well grounded in fact or warranted by existing law establishing the liability of the moving Defendants in this case, despite his continually disputed assurance that he would do so, constituted bad faith and oppressive behavior and is sanctionable under 12 O.S. 1991 §2011. *Winters v. City of Oklahoma City*, 740 P.2d 724, 728 n. 22 (Okl. 1987).

VI.

The Court is not at liberty to disregard undisputed evidence and must accept the same as true. The undisputed evidence offered on behalf of the Hillcrest Entities, Jones, Pathologists and Anesthesiologists regarding the violation of 12 O.S. 1991 §2011 and the testimonial evidence regarding the reasonableness of the attorney fees must be accepted as true. *Thomas v. Thomas,* 565 P.2d 722 (Okl. App. 1976).

VII.

The Hillcrest Entities, Jones Pathologists and Anesthesiologists have met their burden of proof in support of their Motion for Sanctions, and the Court concludes that sanctions in the form of attorney fees and costs should be imposed against Mr. Bill V. Wilkinson personally, and against his interest within the law firm of Wilkinson & Monaghan. *Unit Petroleum Company v. Nuex Corporation,* 807 P.2d 251 (Ok. 1991), and that his counter-claim should be denied.

The combined amount of the sanctions of over $710,000 that was requested is easily justifiable under the extreme and frivolous and malicious circumstances in this case and was reasonably and fairly calculated by all of the defendants. However, the Court must also consider other factors which include deterrence, ability to pay, *history,* bad faith, malice, severity, et cetera, and sanctions should not be used to drive an attorney out of practice or take the place of bar discipline. *White v. General Motors Corporation, Inc.,* 908 F.2d 675 (10th Cir. 1990). Therefore, considering all of the above criteria, the Court finds that

Defendants Hillcrest Health Care Corporation, Hillcrest Medical Center Foundation, Hillcrest Service Company, Hillcrest Real Estate, Inc., Dr. Gary Breipohl, Dr. Jonathan Anthony, Dr. Robert Spohr, Dr. Thomas Singletary, Dr. Harold Voss, Dr. Dan Wiesemeyer, Dr. Duane Brothers, Dr. Frederick Jones, Dr. Douglas Hubner, Dr. Jerry Puls individually, Jerry L. Puls, M.D. Inc., and South Utica Pathology should each be awarded $12,500 of their respective fees and costs as sanctions against Mr. Bill V. Wilkinson and his interest only in the law firm.

Since this Court is not aware of Mr. Wilkinson's net worth and does not desire to cause undue harm to his family or his practice, the Court would consider reducing these amounts if furnished a complete CPA certified accounting of his assets, liabilities, and net worth, if this accounting is furnished within 15 days. If the accounting is not furnished, then execution may issue on the above amounts after 15 days has expired.

/s/ David L. Peterson
DAVID L. PETERSON
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on the 11 day of April, 1994, I mailed a true and correct copy of the above and foregoing to the following with sufficient postage thereon fully prepaid:

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Marianne Moffett,
Deputy Court Clerk

EXHIBIT "B"

SUMMARY OF CASE

Appellant law firm formerly represented the plaintiffs in this tort action. Following an unsuccessful trial the law firm was discharged. Shortly thereafter the law firm filed a separate civil case (CJ-93-02879) to foreclose its attorney lien for fees and costs. The Defendants and the new Plaintiffs' attorneys settled around the law firm. The Trial Judge entered an order on April 11, 1994, finding that the attorney fee contract was invalid. The law firm now appeals this determination and final order.

Following the trial, several Defendants filed applications for sanctions against Bill V. Wilkinson and Wilkinson & Monaghan, Inc. under 12 O.S. § 2011. On April 11, 1994, the Trial Court issued another order which granted these applications and invoked sanctions against the law firm. The law firm now appeals this determination and final order.

EXHIBIT "C"

ISSUES AND ERRORS PROPOSED TO BE RAISED ON APPEAL

The Trial Judge committed error by failing or refusing to do the following:

1. To recuse or disqualify as the judge in determining the Application for Sanctions and for costs and fees considering the nature and background of the case.

2. To rule on or consider the law firm's Application to Strike and/or Motion to Dismiss and Motion for Summary Judgment and brief.

3. To conduct a hearing on the law firm's Application to Strike and/or Motion to Dismiss and Motion for Summary Judgment even though the Court entered a minute order setting the application and motions for hearing.

4. To require the Defendants seeking sanctions to respond to the law firm's Motion for Summary Judgment as required by Rule 13.

5. To grant the law firm's first and second motions to compel discovery.

6. To grant the law firm's request for a scheduling order and a pretrial conference prior to the trial.

7. To grant the law firm's application to inspect letters and records allegedly provided by Defendants to the Court for "In Camera" inspection.

8. To permit the law firm to depose the Plaintiffs.

9. To grant the law firm's application for extension of time to respond to Chris Jones' Motion for Summary Judgment.

10. To grant the law firm's application for continuance of the trial for sanctions, fees and costs.

11. To grant the law firm's application to stay adjudication or further proceedings regarding sanctions against the law firm.

The Trial Court committed the following errors in the trial on March 29 and March 30, 1994:

12. In failing to apply an objective standard so as to determine and consider whether a reasonable and competent attorney would believe in the merits of the arguments and claims asserted.

13. In permitting the Defendants to prosecute their sanction claims on the basis of alleged negligence even though their answers to interrogatories denied that these claims were based in negligence and over the objection of the law firm.

14. In denying the law firm's demurrers and motions to dismiss because the proof introduced by Defendants did not establish claims against the law firm under 12 O.S. § 2011.

15. In accepting evidence over the objections of the law firm and in failing to strike the same evidence regarding attorney fees and costs when the law firm established through cross-examination that the Defendants either could not or would not separately identify fees and costs resulting solely from the specific actions complained of in their applications.

16. In failing to require the Defendants to meet their burden of proof in establishing their allegations for sanctions under 12 O.S. § 2011 in accordance with Oklahoma law.

17. In imposing a burden of proof on the law firm with regard to the claims by the Defendants under 12 O.S. § 2011.

18. In relying on the Court's earlier rulings made during the jury trial of the tort claims wherein the Court erroneously dismissed these Defendants by granting

demurrers and/or sustaining motions to dismiss, thereby warranting the imposition of sanctions against the law firm under 12 O.S. § 2011.

19. In determining that there was no evidence showing that there was a reasonable basis to believe that the allegations made against these Defendants were well grounded in fact, or warranted by existing law.

20. In determining that the law firm was required under Oklahoma law to prove that the Hillcrest Entities provided medical care and treatment to Norma Levitt as a prerequisite for liability, and that sanctions should be awarded against the law firm because of such determination.

21. In determining that the failure of the law firm to voluntarily dismiss the Defendants pursuant to admonitions of the Trial Court amounted to harassment, thereby warranting the imposition of sanctions under 12 O.S. § 2011.

22. In determining that the actions of the law firm caused unnecessary delays in the discovery and trial of this case, thereby warranting the imposition of sanctions under 12 O.S. 2011.

23. In determining that the actions of the law firm caused a needless increase in the cost and time of litigation, thereby warranting the imposition of sanctions under 12 O.S. § 2011.

24. In determining that the law firm was required to contact or consult a pathologist regarding the claims against these defendant pathologists, thereby warranting the imposition of sanctions under 12 O.S. § 2011. This

determination falsely assumes that an expert cannot be qualified to testify and prove acts or omissions against a pathologist defendant unless the expert is a pathologist and/or that the law firm could not have conducted a proper investigation without first consulting with a pathologist.

25. In determining that not one of the Plaintiff's experts had testified in deposition that the pathologist defendants acted or failed to act in such a manner that they caused or contributed to the death of Norma Levitt, and that such determination warranted the imposition of sanctions against the law firm under 12 O.S. § 2011.

26. In determining that it was a necessary prerequisite to establish that the pathology defendants were directly involved in the care and treatment of patient Norma Levitt, and that the law firm had failed to produce any evidence of this nature, thereby warranting the imposition of sanctions against the law firm under 12 O.S. § 2011.

27. In determining that the law firm failed to meet its burden of proof, as defined by the Court, in opposing the applications for sanctions, thereby warranting the imposition of sanctions under 12 O.S. § 2011.

28. In determining that the law firm failed to address and/or reveal evidence was accumulated prior to the time that the Amended Petition was filed or during discovery involving the claims against these Defendants, thereby warranting the imposition of sanctions under 12 O.S. § 2011.

29. In determining that the Court is still left to speculate whether the required evidence ever existed and the exact nature of the evidence supporting the claims against these Defendants, thereby warranting the imposition of sanctions against the law firm under 12 O.S. § 204.

30. In determining that the proper criteria to be applied in the adjudication of the sanctions applications is the consideration of evidence accepted by the Trial Court during the trial, or that the law firm has the burden of proof in the sanctions application trial to offer additional proof involving the evidentiary errors committed by the Trial Court during the jury trial and that the law firm has failed to meet this burden, thereby warranting the imposition of sanctions against the law firm under 12 O.S. § 2011.

31. In determining that Mr. Wilkinson still fails to understand that the separate act of each defendant must be shown to create liability for any of them, thereby warranting the imposition of sanctions against the law firm under 12 O.S. § 2011.

32. In determining that neither Mr. Bill V. Wilkinson nor the law firm offered any sworn testimony at the trial in 1993 or at the sanctions hearings on March 29 and March 30, 1994, in opposition to the reasonableness of the attorney fees offered on behalf of the Hillcrest Entities, Pathologists, Anesthesiologists, and Dr. Frederick Jones, thereby warranting the imposition of sanctions against the law firm under 12 O.S. § 2011.

33. In determining that these Defendants are the proper parties and the real parties in interest under 12

O.S. § 2017(A) to claim attorney fees and costs against the law firm in the sanctions applications.

34. In determining that discovery attempted by the law firm should be limited in scope, as was done by the Trial Court, and that Rule 11 controls the Trial Court's interpretation of the law firm's rights of discovery in this matter.

35. In determining that the actions of the law firm in this matter constitute bad faith and oppressive behavior and are, therefore, sanctionable under 12 O.S. § 2011.

36. In determining that the claims asserted by these Defendants in the trial of the application for sanctions were undisputed, thereby warranting the imposition of sanctions against the law firm under 12 O.S. § 2011.

37. In denying the law firm's counter-claim.

38. In determining that these Defendants who filed applications for sanctions should be awarded the sum of $12,500 each for their respective fees and costs as sanctions against the law firm.

39. In failing to limit the award for fees and costs, if any, in accordance with 23 O.S. § 103.

40. In determining that execution may issue against the law firm even though no judgment has been entered as required by law.

The Presiding Judge committed error with regard to his ruling on April 14, 1994, as follows:

41. In failing to permit the law firm to present evidence in support of their application to disqualify the Trial Judge.

42. In determining that the law firm had not complied with Rule 15(a).

43. In failing to disqualify the Trial Judge.

The Trial Judge committed error in the written order of April 11, 1994, designated as "Order on Attorney's Lien" as follows:

44. The Trial Judge had previously entered an order on April 8, 1994, transferring Case No. CJ-93-2879 back to Judge Wiseman, and no longer had jurisdiction or venue over that case which involves the attorney's lien and fees and costs.

45. The Trial Judge determined that his findings of April 11, 1994, are res judicata to Case No. CJ-93-2879, even though he no longer has jurisdiction in such case, and even though the minute order of April 8, 1994, indicates he will be a witness in Case CJ-93-2879.

46. The determination that the fee agreement contract appears to be against public policy and contrary to the interest of the Oklahoma statutes.

47. The determination that the law firm should be deprived of any fee.

48. The determination that accusations of negligence and incompetence during the trial were neither rebutted nor denied.

49. The determination that Mr. Wilkinson during the trial failed to either understand or follow the standard rules of evidence or the rules of proper attorney conduct.

50. The determination that the case was settled because of the expertise of the Sellers Law Firm and because the Court had under advisement a motion for new trial based on incompetent representation.

51. The determination that it would be improper to grant fees under the circumstances in this case.

52. The determination that the funds on deposit with the Creek County Probate Court may be disbursed to the clients by the Probate Court in its discretion and that the initial court costs ($184.00) should be paid to Mr. Bill V. Wilkinson, as well as the monies expended for Dr. Zuck ($17,394.00).

53. The determination that Bill V. Wilkinson and his law firm were discharged by these clients for good cause.

Supreme Court, U.S.
FILED
SEP 10 1996
CLERK

(4)

No. 96-6

In The

Supreme Court of the United States

October Term, 1995

WILKINSON AND MONAGHAN, A PROFESSIONAL CORPORATION AND BILL V. WILKINSON,

Petitioners,

v.

HILLCREST HEALTHCARE CORPORATION, HILLCREST MEDICAL CENTER FOUNDATION, HILLCREST REAL ESTATE, INC., HILLCREST SERVICE COMPANY, JERRY PULS, M.D., DOUGLAS HUBNER, M.D., JERRY L. PULS, M.D., INC., AND SOUTH UTICA PATHOLOGY LABORATORIES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The State Of Oklahoma Division IV

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I. INTRODUCTION

Petitioners Wilkinson and Monaghan and Bill V. Wilkinson submit this brief in reply to the brief of both the Pathologist Respondents and the Hillcrest Respondents in opposition to the petition for certiorari in this matter.

II. ARGUMENT

A. PETITIONERS PROPERLY RAISED THE DUE PROCESS ISSUE BELOW

In their petition, Petitioners explained in detail how the issues of both the trial judge's lack of neutrality and the resulting violation of petitioners' due process rights had been raised in the courts below. *See* Petition for Writ of Certiorari, at pp. 8-13. Completely ignoring this description, both Respondents cryptically assert that the due process issue was not presented. Because this question was fully discussed in the Petition, Petitioners will rely on that discussion.[1]

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[1] One further point should be noted. The Respondent Pathologists assert that Petitioners failed to comply with the state law procedural requirements for raising constitutional issues. Respondent Pathologists' Brief in Opposition, at 5-6. Assuming, solely for purposes of argument, the accuracy of this assertion, the fact remains that at no point did the state courts below decline to adjudicate the due process issue because of such lack of compliance. The Petitioners' alleged lack of compliance with such requirements, then, cannot serve as an independent and adequate state ground for this Court's refusal to adjudicate Petitioners' due process claim.

B. RESPONDENTS CONSTRUE THIS COURT'S DUE PROCESS PRECEDENTS IN AN UNDULY NARROW MANNER

In their Petition for Certiorari, Petitioners argued that the due process right to an independent adjudicator fashioned in such cases as *In re Murchison*, 349 U.S. 133 (1955), and *Tumey v. State of Ohio*, 273 U.S. 510 (1927), dictates that the trial judge who had previously determined essential issues of law directly related to sanctions sought to be imposed on an attorney could not himself impose those sanctions. While concededly none of this Court's precedents shaping the right to a neutral adjudicator has dealt directly with the issue of attorney sanctions, Petitioners argued that both the logic and rationale of those decisions were directly applicable in the attorney sanctions context. Respondents have sought to attack this argument, by characterizing this Court's due process precedents in an absurdly narrow manner. In so doing, they have missed the point both of this Court's decisions and the important constitutional values served by the right to a neutral adjudicator.[2]

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[2] In addition to their mischaracterization of this Court's due process precedents, the Respondent Pathologists incorrectly attempt to place the law of Oklahoma above the Fourteenth Amendment's Due Process Clause, by relying on the power given to trial courts pursuant to state law. Respondent Pathologists' Brief in Opposition, at 16-18. However, if the Due Process Clause prohibits a particular result, the fact that such a result is authorized by state law is of course completely irrelevant. A contrary conclusion would violate basic notions of the supremacy of federal law. *See*, U.S. Const. Art. VI, cl. 2; *Testa v. Katt*, 330 U.S. 386 (1947).

Contrary to Respondents' contentions, *Murchison* was considerably more than a case about a judge who conducted a secret "judge-grand jury" proceeding. Rather, *Murchison* has been widely relied upon in later decisions of both this Court and lower courts for the proposition that absent an emergency situation, a judge who is the victim of contempt may not adjudicate and punish that contempt. *See*, Sedler, *The Summary Contempt Power and the Constitution: The View From Without and Within*, 51 N.Y.U. L. Rev. 34 (1976). This conclusion is based on the simple but compelling premise that a judge in such a position cannot be assumed to have the neutral perspective required by the concept of fair adjudication.

Similarly, Respondents' attempt to characterize this Court's decision in *Tumey* as concerned with nothing more than the issue of pecuniary interest misses the point of that decision. To be sure, the presence of a pecuniary interest, as in *Tumey*, will violate the constitutional right to a neutral adjudicator. But while the presence of a pecuniary interest constitutes a *sufficient* grounds for violation of due process, it has never been suggested that it is a *necessary* condition. Indeed, the contempt cases, such as *Murchison*, conclusively demonstrate that the right to a neutral adjudicator may be violated, even absent the existence of a pecuniary interest. The concern of this Court in *Tumey*, in the opinion's own words, was the avoidance of any "possible temptation to the average man as a judge. . . ." 273 U.S. at 532. Surely, this category includes far more than merely the presence of a pecuniary interest.

Further indication that the presence of a pecuniary interest is not a prerequisite to the triggering of the neutral adjudicator requirement appears in this Court's

decision in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). There this Court held that the State Attorney General who was actively in charge of an investigation could not sit as the final arbiter of the existence of probable cause for a search: "Without disrespect to the state law enforcement agent here involved, the whole point of the basic rule [that a showing of probable cause is required] is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigation. . . ." 403 U.S. at 450. Surely, there was no reason to think the Attorney General had a pecuniary interest in the issuance of a search warrant, yet this Court nevertheless rightly found that he lacked the requisite neutrality to make such a determination.

C. A TRIAL JUDGE CALLED UPON TO REVIEW HIS OWN DECISIONS IS NOT A NEUTRAL ADJUDICATOR

The key point ignored by Respondents in their unduly truncated analysis of this Court's decisions is that in this case, as in those cases, it is unreasonable to expect the trial judge to possess the requisite neutrality in ruling upon the appropriateness of the sanctions issued against Petitioners. Just as no man can be a judge in his own case [*Dr. Bonham's Case*, 77 Eng. Reg. 646, 8 Coke 114a (c.p. 1610)], so, too, is a judge incapable of neutrally sitting in judgment on the correctness of his own decision.[3] This is because, in the words of a leading scholar:

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[3] It is true, of course, that trial judges are in a position effectively to review their earlier rulings pursuant to motions for a new trial. *See* Fed. R. Civ. P. 59. The availability of such motions, however, in no way avoids the availability of or need

> The judge responsible for making primary decisions must necessarily make a heavy investment of time and interest in particular disputes and individuals that come before him; his limited perspective and his limited opportunity for reflection makes it impossible for him to coordinate successfully with his colleagues. Vanity and pride of opinion are additional obstacles; even very sensitive, intelligent, and self-disciplined judges must be troubled at times by their own involvement of ego.
>
> Carrington, *Crowded Dockets and the Court of Appeals: The Threat to the Function of Review and the National Law*, 82 Harv. L. Rev. 542, 551 (1969).

Moreover, "even if trial judges are capable of maintaining necessary objectivity, and their decisions are usually correct . . . preserving the appearance of justice in the eyes of the litigants who would otherwise view themselves as victims of arbitrary individuals is an equally important goal." Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 Colum. L. Rev. 89, 97 (1975). *See also Offutt v. United States*, 348 U.S. 11, 14 (1954) ("justice must satisfy the appearance of justice.").

As explained in the Petition for Writ of Certiorari, the validity of the sanctions in this case turns entirely on the correctness of the trial Court's exclusion of key evidence proffered at trial by Petitioner Wilkinson. If that evidence

---

for subsequent appellate review. Moreover, while normally the trial judge will satisfy the neutral adjudicator requirement when he rules initially, that is not true here, because at the time of the judge's initial ruling Petitioners had not yet been afforded a hearing.

had been improperly excluded by the trial Court, the entire basis for the sanctions would have disappeared.[4]

At Petitioners' constitutionally required hearing, the final adjudicator was the very same individual who had previously ruled on the key question for decision. The decisional neutrality required by due process is clearly absent in such a situation.

D. THERE EXISTS AN IMPORTANT NEED FOR THIS COURT TO RECONCILE THE IMPOSITION OF ATTORNEY SANCTIONS WITH PROCEDURAL DUE PROCESS

In support of their assertions that the imposition of attorney sanctions by the trial judge does not violate due process, Respondents cite decisions of this Court in which such sanctions have been upheld. *See* Respondent Pathologists' Brief in Opposition, at 12-14. However, in none of these cases has this Court ever raised, much less given serious consideration to, the possible relevance of the due process right to a neutral adjudicator. This is an issue of enormous practical and theoretical importance, to which this Court has yet to devote any attention. The present case provides just such an opportunity. This case involves the largest sanction award against an attorney in Oklahoma and certainly involves one of the largest ever awarded in the United States. The procedural due process issue forming the basis of this Petition For Certiorari is

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[4] Contrary to the position taken by Respondents [Hillcrest Respondents' Brief in Opposition, at 20-26], the accuracy of the trial judge's ruling under the applicable state law of evidence is irrelevant to the issue before this Court.

best characterized by Attorney Wilkinson's plea to the District Judge before the sanction hearing:

> There are currently pending claims for fees and costs against the law firm in excess of $650,000. It would be in the best interest of everyone concerned for a completely neutral judge who has no background in this litigation to determine these important issues. As you can imagine, the determination of these issues is of vital importance to the law firm and may well mean, 'life or death' to the firm. Thus we want to insure that the adjudication process is completely objective. (Petitioners' Petition For Writ of Certiorari, p. 9.)

III. CONCLUSION

For the foregoing reasons, Petitioners respectfully ask this Court to grant their Writ of Certiorari.

Respectfully submitted,

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